(1)

No. 90-98

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1989

GEORGE FRANKLIN, *et al.*,
Petitioners,
VS.

Peat Marwick Main & Co., et al.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

WILLIAM S. LERACH
LEONARD B. SIMON
(Counsel of Record)
BLAKE M. HARPER
HELEN J. HODGES
ERIC A. ISAACSON
MILBERG WEISS BERSHAD
SPECTHRIE & LERACH
225 Broadway, Suite 2000
San Diego, CA 92101
(619) 231-1058

MICHAEL P. FUCHS
PATRICIA I. AVERY
WOLF POPPER ROSS WOLF
& JONES
845 Third Avenue
New York, NY 10022
(212) 759-4600
Counsel for Petitioners

Bowne of Los Angeles, Inc., Law Printers. (213) 627-2200

121

QUESTIONS PRESENTED

1. Whether, in a case brought under Section 11 of the Securities Act of 1933, a good faith settlement with some but not all defendants reduces the potential liability of the remaining defendants by the amount of the settlement, or by the "proportional culpability" of the settling defendants as determined at trial?

2. Whether there is an implied right to contribution available to a defendant sued under Section 10(b) of the Securities Exchange Act of 1934 and/or Section 12 of the Securities Act of 1933?

3. Whether, in a case brought under Section 10(b) of the Securities Exchange Act of 1934 or Section 12 of the Securities Act of 1933, a good faith settlement with some but not all defendants reduces the potential liability of the remaining defendants by the amount of the settlement, or by the "proportional culpability" of the settling defendants as determined after a trial?

PARTIES

Plaintiffs and appellees before the United States Court of Appeals were the petitioners herein, George Franklin, Jon Quint, Ellen Quint, Stefan Reznik, William B. Weinberger, Richard Lowe, Paul L. Holmes and Evelyn S. Holmes, on behalf of themselves and a certified class including all persons other than defendants who purchased Kaypro Corporation stock during the class period. Nonsettling defendants and appellants before the Ninth Circuit were the respondents herein, Peat Marwick Main & Co. and Prudential-Bache Securities. The other parties below, who are presumably not affected by this petition, are the settling defendants, Kaypro Corp., Andrew F. Kay, David A. Kay, Allan M. Kay, Mary M. Kay, Arthur B. Laffer, Bradford W. Ryland, Ludwig Weindling and Roger Woolley.

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES

Statutes

TABLE OF AUTHORITIES

Rules

Miscellaneous

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The petitioners, George Franklin, Jon Quint, Ellen Quint, Stefan Reznik, William B. Weinberger, Richard Lowe, Paul L. Holmes and Evelyn S. Holmes, on behalf of themselves and a certified class including all others similarly situated, respectfully pray that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled proceeding and reported at 884 F.2d 1222 (9th Cir. 1989).

OPINIONS BELOW

In the United States District Court for the Southern District of California, the Honorable Leland C. Nielsen, presiding: *In re Kaypro Corp. Shareholder Litigation,* No. 84-2091 N(M) (S.D. Cal. Feb. 1, 1988) [reprinted at Appendices B, C].

In the United States Court of Appeals for the Ninth Circuit, the Honorable Judges Farris, Beezer and Ferguson, presiding: *Franklin v. Kaypro Corp.,* 884 F.2d 1222 (9th Cir. 1989) [reprinted at Appendix A], *petition for rehearing and suggestion for rehearing en banc denied,* April 10, 1990 [reprinted at Appendix E].

JURISDICTION

After the Ninth Circuit issued its decision on September 6, 1989, plaintiffs timely petitioned for rehearing and suggested rehearing *en banc* on September 20, 1989, which petition for rehearing was denied on April 10, 1990, so that this petition for *certiorari* is timely filed by July 9, 1990. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

Securities Act of 1933 Sections 11(a),(f), 15 U.S.C. § 77k(a),(f):

> (a) In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue —

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may

be established without proof of the reading of the registration statement by such person.

* * *

(f) All or any one or more of the persons specified in subsection (a) of this section shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

Securities Act of 1933 Section 12, 15 U.S.C. § 77l:

Any person who —

(1) offers or sells a security in violation of [section 5], or

(2) offers or sells a security (whether or not exempted by the provisions of [section 3], other than paragraph (2) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

Securities Exchange Act of 1934 Section 10(b), 15 U.S.C. § 78j(b):

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Securities Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in

order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

I.

STATEMENT OF THE CASE

A. Introduction

This case presents important questions arising under the federal securities laws, which have created Circuit splits, and which in combination threaten to discourage partial settlements in all multi-defendant federal securities cases.

Plaintiffs who establish liability for violations of the federal securities laws are entitled to a judgment affixing joint and several liability upon the defendants[1] However, in this case the Ninth Circuit held that the right to contribution under Section 11 of the Securities Act of 1933 ("1933 Act"), 15 U.S.C. § 77k, supersedes that Section's provision for joint and several liability, so that a plaintiff who enters a partial settlement with some of the defendants loses his right to enforce joint and several liability against the rest, even after deducting the amount of the settlement. The court's holding that *plaintiffs who settle on reasonable terms lose the right to be made whole* is based on the novel doctrine that the plaintiffs' right to joint and several liability is subservient to considerations of "equity between wrongdoers" who injured the plaintiffs. App. at 19a-20a. The Ninth Circuit's holding thus abrogates Congressionally mandated joint and several liability and, as a consequence, discourages settlements and forces parties who would settle to litigate against their will. The court's holding is contrary to the majority rule under state law, to the bulk of federal law outside the

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[1] *E.g.*, 15 U.S.C. §§ 77k(f); 77(o); 78t(a).

Ninth Circuit[2], and to the law of California which governs the pendent claims embraced within the same settlement[3].

The opinion below fails to recognize that Congress has mandated joint and several liability in securities cases for the benefit of innocent victims, and that some defendants, including those who may be said to be most culpable, may not have assets (or insurance coverage) with which to satisfy a judgment. By imposing joint and several liability, in Section 11(f) of the 1933 Act and elsewhere, Congress determined that the culpable and solvent parties, rather than the injured parties, should bear the risk that some joint tortfeasors will lack the means to satisfy the judgment. That is, a well-to-do defendant found liable may have the entire judgment collected from him, and his right to contribution under Section 11(f) may be worthless if his joint tortfeasors are insolvent. Under the Court of Appeals' ruling, that risk is shifted to plaintiffs if they wish to enter settlements with any defendant of limited means.

The second issue upon which the Ninth Circuit is in conflict with other Circuits (and has ignored the force of this Court's most pertinent precedents) is its holding that a right to contribution under Section 10(b) of the Securities Exchange Act of 1934 ("1934 Act") may be implied by judicial fiat. This ruling was made without engaging in the analysis mandated by this Court's precedents in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), and *Northwest Airlines, Inc. v. Transport Workers*

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[2]The Ninth Circuit expressly rejects the Second Circuit precedent of *Singer v. Olympia Brewing Co.*, 878 F.2d 596 (2d Cir. 1989), *cert. denied*, ____ U.S. ____, 110 S. Ct. 729 (1990). *See* App. 17a-19a, 21a-22a.

[3]*See Tech-Bilt, Inc. v. Woodward-Clyde & Associates*, 38 Cal.3d 488 (1985).

Union, 451 U.S. 77 (1981), and consequently is in conflict with several circuit and district court precedents which apply *Texas Industries* and *Northwest Airlines* and which accordingly hold that no right to contribution may be implied under sections of the federal securities laws that do not explicitly provide for contribution.

In addition, the Ninth Circuit's opinion, although ambiguous, may fairly be read to extend its abrogation of joint and several liability under Section 11 also to Section 10(b) of the 1934 Act and Section 12 of the 1933 Act. Such a holding combines the two vices described above.

Because the Ninth Circuit's holding splits the circuits on these very important issues, because it abrogates joint and several liability, because it finds an implied right to contribution in contravention of this Court's holdings and because it discourages settlement, *certiorari* should issue so that this Court may properly and uniformly resolve the underlying legal principles applicable to cases brought under the anti-fraud provisions of the federal securities laws.

B. Factual Background

Petitioners represent a class of persons who purchased Kaypro Corp. ("Kaypro") common stock at prices which they alleged to be fraudulently inflated. They brought a class action against Kaypro, several of its top officers and directors, and the two respondents herein: Kaypro's investment banker and the lead underwriter for Kaypro's initial public stock offering, Prudential-Bache Securities ("Bache"), and Kaypro's certified public accountants and auditors, Peat Marwick Main & Co. ("Peat Marwick"). The suit charges violations of state and federal law, asserting claims pursuant to Section 10(b) of the 1934 Act, 15 U.S.C. § 78j(b), Sections 11 and 12 of the 1933 Act, 15 U.S.C. §§ 77k and 77l, and pendent state-law

claims for fraud and deceit and for violation of the California Corporations Code Sections 25400 and 25401[4].

After discovery and certification of the plaintiff class, settlement negotiations ensued between plaintiffs, on the one hand, and Kaypro and its officers and directors on the other. Bache and Peat Marwick were invited to join the settlement discussions, but refused.

Kaypro was on its way to bankruptcy (which occurred subsequent to the settlement at issue here), and its officers and directors did not have sufficient personal wealth to contribute significantly to a judgment in a case of this nature, involving claimed damages of over $25 million. However, Kaypro's officers and directors were covered by a liability insurance policy in the amount of $20 million. The policy not only had arguably applicable exclusions, but also was a "wasting asset" policy, so that any defense costs reduced the amount of insurance potentially available — meaning that the ability of these defendants to contribute to a settlement would be reduced over time by the exhaustive litigation, and potentially a jury trial, in a complex case of this nature. For these reasons, after extensive arm's length negotiations, plaintiffs, Kaypro, and the officers and directors agreed that it was in their mutual self-interest to settle the claims for $9.25 million.

Of course, the settling defendants and their insurers would not pay $9.25 million unless they thereby "bought peace," extricating themselves fully from potential liability in the case. To expend a substantial portion of their insurance coverage to settle plaintiffs' claims, only to face

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[4]The district court had jurisdiction over this case pursuant to 15 U.S.C. §§ 77v, 78aa and 28 U.S.C. §1331. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. §1291, and Rule 54(b), Fed. R. Civ. P.

exposure to Peat Marwick and Bache on cross-claims for contribution under Section 11 would have accomplished nothing. The settling defendants thus demanded protection from cross-claims for contribution as a condition of settlement.

The settling parties sought to obtain this protection from contribution claims of the non-settling defendants by requesting an order from the district court that the settlement was in good faith, that it barred claims for contribution against the settling defendants, and that the $9.25 million would be a set-off against any judgment obtained after trial of the nonsettling defendants. District court authority within the Ninth Circuit at the time permitted such an order on the federal securities claims,[5] and California statutory law explicitly sanctioned such a ruling on the pendent claims arising under state law.[6]

C. The Opinions Below

1. The District Court

The district court approved all aspects of the partial settlement. After a hearing before the magistrate, and after a *de novo* review and further hearing before the district court demanded by Bache and Peat Marwick, the court, over strenuous objections from Bache and Peat Marwick, found the settlement to be in good faith and entered an order cutting off claims of contribution against

[5] *In re Washington Public Power Supply System Securities Litigation*, 720 F. Supp. 1379, 1398 (D. Ariz. 1989); *In re Washington Public Power Supply System Securities Litigation*, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,326, at 92,144 (W.D. Wash. 1988); *Kirkorian v. Borelli*, 695 F. Supp. 446, 452 (N.D. Cal. 1988); *In re Nucorp Energy Securities Litigation*, 661 F. Supp. 1403, 1408 (S.D. Cal. 1987).

[6] California Code of Civil Procedure Sections 877, 877.6 (West 1980 & Supp. 1990).

the settling defendants. The court reviewed liability-related facts, damage analyses, insurance coverage, and other matters, and concluded that the settlement

> is within the reasonable range of the Settling Defendants' proportional share of liability for the Settling Plaintiffs' alleged injuries and reflects the proper and fair share of the Settling Plaintiffs' alleged damages, with due recognition being given to the risks of continued litigation against the Settling Defendants, the difficulties associated with satisfaction of any judgment against the Settling Defendants, the risk of dissipation or loss of assets of the Settling Defendants, including any applicable insurance coverage, and the fact that the Settling Defendants should pay less in settlement than if they were found liable after trial.

App. at 32a. The court further held that "[t]here is no evidence of collusion, fraud or tortious conduct in entering the Stipulation by any of the parties to the Stipulation aimed at causing injury to the interests of the Non-Settling Defendants." *Id.* at 32a. The court applied principles derived from the law of California, and adopted by several district courts within the Ninth Circuit, *see* n.5, *supra,* to hold that the settlement was fair to all parties, entered in good faith, and therefore operated as a bar to claims for contribution and a $9.25 million offset against any judgment. App. 33a.

2. The Court Of Appeals

The non-settling defendants, Bache and Peat Marwick, appealed on the ground that a settlement could not bar contribution claims under federal securities law. Bache and Peat Marwick also contended that, contrary to the district court's finding of fact, the settlement was not entered in good faith. Finally, Bache argued that it had a

right to recover from a settling defendant pursuant to a contractual indemnity clause.[7]

As a preliminary matter, the Court of Appeals rejected the assertion by Bache and Peat Marwick that district courts lack power to bar contribution claims, App. at 15a-17a, noting that "the non-settling defendants' simplistic approach would preclude partial pretrial settlement." *Id.* at 16a. Thus the court acknowledged that, without an effective method of cutting off cross-claims, defendants would never settle such cases.

Having rejected Bache and Peat Marwick's principal argument that contribution bar orders were forbidden, the Court of Appeals affirmed the district court's holding that the settlement was fair and entered in good faith. However, the Court of Appeals determined to tinker with the result below, focusing its efforts upon an issue hardly addressed by the briefs — the amount of the offset to which Bache and Peat Marwick would be entitled at trial because of the $9.25 million settlement.

In addressing this issue, the court determined that it was required to create federal common law. Moreover, although plaintiffs' federal claims were based on Section 10(b) of the 1934 Act, and Sections 11 and 12 of the 1933 Act, the Ninth Circuit's analysis of this issue focused exclusively on Section 11(f)'s explicit provision for contribution among defendants,[8] which has no parallel in Section 12 or Section 10(b).

[7]The law is clear that indemnification is not permitted under the federal securities laws, *see King v. Gibbs*, 876 F.2d 1275, 1278-83 (7th Cir. 1989), *and cases cited therein, id.* at 1282-83; App. at 23a.

[8]Section 11(f) provides:

> (f) All or any one or more of the persons specified in subsection (a) shall be jointly and severally liable, and every person who becomes liable to make any payment under this

The Court of Appeals identified two possible offset rules — the "pro tanto" rule followed by most courts and adopted by the Second Circuit in *Singer*,[9] under which the offset against total damages would be $9.25 million, and the "proportional culpability" rule adopted by a newly-decided district court case within the Third Circuit, *In re Sunrise Securities Litigation*, 698 F. Supp. 1256 (E.D. Pa. 1988), under which the offset would be the "proportional" culpability of the settling defendants, as determined at trial. The court chose the *Sunrise* rule, affirming the district court's order barring contribution, but "remand[ing] the order to the district court so that . . . it may refashion its order," App. at 23a, to provide for a proportional setoff with respect to liability under Section 11, and a pro tanto setoff against damages for California law claims.

In other words, as to plaintiffs' federal claims, the court permitted a bar against cross-claims for contribution, but exacted a "price" from plaintiffs for that bar: elimination

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section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

15 U.S.C. § 77k(f).

[9] *Singer v. Olympia Brewing Co.*, 878 F.2d 596 (2d Cir. 1989); *accord, e.g., Dalton v. Alston & Byrd*, Civ. No. 85-4302 (S.D. Ill. May 24, 1990) (publication pending), *reprinted at* Appendix F; *In re Atlantic Financial Management, Inc. Securities Litigation*, 718 F. Supp. 1012, 1017-18 (D. Mass. 1989). *See also Restatement (Second) of Torts* § 885(3); Uniform Contribution Among Tortfeasors Act § 4 (1955); *Process Masters, Inc. v. Alpha III Ltd. Partnership*, 477 So. 2d 69 (Fla. Dist. Ct. App. 1985); *Bishop v. Klein*, 380 Mass. 285, 402 N.E.2d 1365, 1371 (1980); Cal. Civ. Proc. Code §§ 877, 877.6 (West 1980 & Supp. 1990); Fla. Stat. Ann. §§ 768.041, 768.31(5) (1986); Ill. Rev. Stat., ch. 70 ¶ 302 (1989); Mass. Gen. L., ch. 231B § 4 (1986); Wash. Rev. Code § 4.22.060 (1989).

of Congressionally mandated joint and several liability. The court held that the settlement would not result in a \$9.25 million credit against damages if the case went to trial against Bache and Peat Marwick, but instead that the "proportional culpability" of Kaypro and its officers and directors would be decided by the jury, and that proportional amount of total damages would be deducted from total damages.

Thus, for example, if the jury found Bache and Peat Marwick jointly and severally liable on the federal claims and calculated damages at \$25 million, but found Kaypro and the settling officers and directors 90% "proportionally responsible," plaintiffs' verdict would be for only \$2.5 million despite the fact that they (a) won their \$25 million case against two solvent defendants, and (b) settled with Kaypro and its officers and directors for what they reasonably believed to be the maximum which could have been recovered from them. Ironically, in such circumstances, plaintiffs would have been better off to spurn settlement, try the case against all defendants, and collect the full \$25 million judgment from Bache and Peat Marwick, leaving them to seek contribution from the bankrupt company, its penurious officers, and its rapidly diminishing insurance coverage. By acting responsibly and settling with several defendants for a large portion of their insurance coverage, plaintiffs were punished. For this reason, the decision below plainly discourages settlements, contrary to the longstanding principle that settlements are to be encouraged. Fed. R. Civ. P. 16(c) Advisory Committee Note; *see* Fed. R. Evid. 408 Advisory Committee Note; *Seymour v. Summa Vista Cinema, Inc.*, 809 F.2d 1385, 1389 (9th Cir. 1987).

In choosing between the *Singer* and *Sunrise* rules, the court first stated that a disadvantage of the *Singer* rule is that:

> Plaintiffs may be tempted to engage in collusion with certain defendants. By accepting a low partial settlement, plaintiffs would be able to fund further litigation with no diminution of the total amount eventually received. Similarly, plaintiffs could effect low settlements with defendants who had limited resources, and thereby force wealthier defendants to pay more than if all parties proceeded to trial.

App. at 17a-18a.

Leaving aside the fact that the "good faith" hearing before the district court is intended specifically to weed out collusive settlements, and that there was a *finding of fact* here of *no collusion,* App. at 32a, the court below erred gravely in this analysis. Under the *Singer* pro tanto rule, "wealthier defendants" *would not pay* "more than if all parties proceeded to trial." If they are found liable, a trial will result in joint and several liability, they will pay *all* of the judgment, and will retain only the problematic right to seek contribution from the defendants with "limited resources."[10] The *Singer* pro tanto rule affords them a

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[10]Of course, there is an additional reason defendants might have to pay more under the Ninth Circuit's novel ruling — because the Court of Appeals abolished the so-called "one satisfaction rule" which holds that a plaintiff may recover only the amount of his injuries, and that this right to actual compensation is to be satisfied only once. The court rejected the Second Circuit's analysis, reasoning that "it is not entirely clear that the one satisfaction rule applies" and that "[w]e are not convinced that the efficient and equitable administration of th[e] statutorily mandated right [of contribution] must yield to the logic of a general rule." App. at 22a. Thus, in this case if the non-settling defendants were found to be 90% culpable at trial, they would be entitled to only a 10% setoff and would be required to pay

certain setoff of $9.25 million, which is at least a fair substitute for an uncertain right to seek contribution after trial from Kaypro, which is in bankruptcy, its officers and directors, who are of limited means, and their insurance, which would diminish day by day. Moreover, the $9.25 million negotiated by plaintiffs is presumptively a fair contribution by these settling defendants, not only because of the district court's approval, but also because plaintiffs' incentive was to maximize this recovery which, in the event of a verdict in favor of Bache and Peat Marwick, would be the only recovery the class would get.

After rejecting the *Singer* "offset" rule by ignoring the plaintiffs' right to the joint and several liability mandated by Congress, the Ninth Circuit embraced the *Sunrise* "proportional liability" rule as better satisfying three goals: "[T]he statutory goal of punishing each wrong-doer, the equitable goal of limiting liability to relative culpability, and the policy goal of encouraging settlement." App. at 19a.

As to the first and third goals, the court offered no reasons for concluding that the *Sunrise* rule was superior to the *Singer* rule. Its discussion of punishment fails to discuss or compare the likely impact of the two rules, App. at 20a, and the discussion of encouraging settlement consists only of a blithe assertion that "[d]efendants that are inclined to settle may do so without penalty or risk." App. at 20a. That, of course, is true under either rule, but only if the plaintiffs are willing to settle. Because the Ninth Circuit effectively holds that settlement deprives

90% of the total damages of $25 million, or $22.5 million. Considering the fact that plaintiffs already have received $9.25 million from the settling defendants, their total recovery would be $31.75 million even if they suffered actual damages of only $25 million.

plaintiffs of joint and several liability, plaintiffs seldom will be willing to enter partial settlements.[11]

The linchpin of the Ninth Circuit's selection of the *Sunrise* rule was its desire to achieve "equity between wrongdoers" by "limiting liability to relative culpability." App. at 19a. The court reasoned that under a rule of proportional setoff "[n]onsettling defendants never pay more than they would if all parties had gone to trial." App. at 21a. *But they often will pay less, because to settle with some defendants the plaintiffs must forfeit the right to be made whole.*

Simply put, the Ninth Circuit has exalted its concept of "equity between wrongdoers" and "limiting liability to relative culpability" — which are nowhere found in the 1933 or 1934 Acts — above the remedial and compensatory purposes of the federal securities laws that are their very reason for existence. The court has ignored the legislative policy — made effective through joint and several liability — and shifted the risk, of inability to collect from a defendant with significant culpability but limited resources, from the joint tortfeasors to the innocent victim. This is the central and crucial error below.

Having clearly imposed the *Sunrise* proportionality rule upon the Section 11 claims, and having affirmed that the pro tanto rule governed the California claims, the Court of Appeals did not explicitly address the offset under Section 12 of the 1933 Act or Section 10(b) of the 1934 Act. It did, however, reaffirm that there is an implied

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[11]The pro rata reduction of plaintiffs' recovery works "strongly against the interest of the injured party and may have the effect of discouraging him from entering into a settlement." *Restatement (Second) of Torts* § 886A, Comment m. *Accord Dalton v. Alston & Byrd,* Civ. No. 85-4302 (S.D. Ill. May 24, 1990) (publication pending), *reprinted at* Appendix F, at 69a-75a.

right of contribution under Section 10(b). App. at 8a-9a. Thus the decision below imposes the proportionality rule upon one of the most important damage rights under the federal securities laws, and appears to impose it upon two others which do not even have explicit rights to contribution.

II.

ARGUMENT

The decision below undermines joint and several liability, handicaps securities fraud victims in their efforts to be made whole, discourages partial settlements, and conflicts with the law in other circuits. It compounds this error by adhering to the Ninth Circuit's prior view that a right of contribution may be implied under Section 10(b) — in disregard of this Court's recent precedents and other circuit's holdings — and then appears to apply the same settlement bar and offset rules to the Section 10(b) claim. These holdings deprive plaintiffs of the full benefit of Section 11 and Section 10(b), and at the same time, by discouraging settlement, burden the federal courts with trials that need not occur and complex trials that could be greatly simplified.

A. *Certiorari* Should Be Granted Because The Ninth Circuit's Decision Contravenes Congressionally Mandated Joint And Several Liability, Provides A Disincentive to Settlement, And For These Reasons, Conflicts With The Law Of Other Circuits

The panel's decision substantially modifies the legislatively mandated rule of joint and several liability, abolishing it for plaintiffs who choose to settle with some but not all defendants. The decision conflicts with the law in the Second Circuit and elsewhere, and will have the dramatic

practical effect of precluding partial settlements in many complex, multi-defendant securities actions because it shifts the risk that some co-defendants will be unable to satisfy the judgment from their joint tortfeasors to the plaintiffs.

For example, if a $10 million securities claim is brought against multiple defendants, and one defendant settles for $100,000, representing every cent he has, under the Ninth Circuit's ruling, the jury would determine the proportional liability of the settling defendant at trial (in his absence), and if it found him 50% responsible, ***his $100,000 settlement would reduce plaintiffs' claims against the other defendants by $5 million!*** However, under the majority rule that plaintiffs urge, the non-settling defendants would remain potentially liable for $9.9 million, which is precisely what joint and several liability requires.

Thus the Court of Appeals' ruling would impel a rational plaintiff to *reject* the $100,000 offer in the circumstances described above for fear of unduly diminishing his total recovery, even though it was all that defendant had. Plaintiff, the would-be settling defendant, the court and the jury would be forced unnecessarily to contend with the liability of that defendant through trial. The result of the Ninth Circuit's new rule — forced litigation between litigants willing to settle — is absurd.

The decision below turns reality inside out by suggesting that its novel rule is required to prevent wealthy non-settling defendants from paying *more* than they would otherwise be required to pay after trial. The panel erroneously stated that, if the Second Circuit's pro tanto rule were adopted:

> [P]laintiffs could effect low settlements with defendants who had limited resources, and thereby *force*

> wealthier defendants to pay more than if all parties proceeded to trial.

App. at 18a (footnote omitted, emphasis in original). *That is simply wrong.* Liability is joint and several, and if all parties proceeded to trial, the "wealthier defendants" *would* pay more than their "proportional share" because of their inability to collect contribution from their impecunious co-defendants.

The policy issue presented here is one of exceptional importance. The issue presented is crucial to numerous pending securities cases, including several large class actions arising from the recent savings and loan scandal. For example, in *In re ACC/Lincoln Savings Securities Litigation,* MDL 834 (D. Ariz.), defendants include Charles Keating, numerous officers and directors of the now-infamous Lincoln Savings and Loan, and several professionals — law firms, accounting firms, investment banking firms. If plaintiffs wish to effect settlements with any of the impecunious and underinsured officers and directors, with the now-defunct Lincoln, or with its bankrupt parent company, they would run the risk of forfeiting much of the potential liability of the professionals, upon a jury finding that Lincoln and its officers were 75%, 85% or even 95% responsible for the wrongdoing. Because of the decision below, these defendants will have to remain in the case, depleting available insurance and further complicating the matter for the court and the jury, so that a joint and several verdict can be obtained and collected fully against the culpable professionals. Thus the professionals' virtually meaningless right to contribution against insolvent joint tortfeasors has been transformed, by the decision below, into a powerful weapon designed to block otherwise reasonable settlements with such parties. Such a rule of law is grotesquely counter-productive.

The panel's decision substantially affects rules of national applicability upon which there should be uniformity. For these reasons, discussed more fully below, *certiorari* should be granted.

1. The Decision Below Conflicts With The Law In Other Circuits

As noted above, the Ninth Circuit explicitly rejected the Second Circuit's resolution of this issue. See App. at 17a-19a, 21a-22a, rejecting *Singer v. Olympia Brewing Co.*, 878 F.2d 596, 599-600 (2d Cir. 1989).

Aside from the Second Circuit, district courts in the First, Fifth and Seventh Circuits have flatly rejected the rule applied below, for precisely the reasons urged here, and particularly, because of the discouragement of settlements. The *Sunrise* case in the Third Circuit is in accord with the Ninth Circuit's reasoning, leaving the Circuits badly split on this important issue.

In *Dalton v. Alston & Byrd,*[12] an Illinois district court carefully analyzed the Ninth Circuit's position and rejected it in favor of the *Singer* rule:

> The Court believes that the *Singer* approach is the better approach to this problem. First, the *Singer* approach is much easier in application. The jury need not determine the relative fault of all defendants, including those defendants who are no longer participating in the trial. Under the *Franklin* approach an exact apportionment of liability needs to occur at some point, i.e. at the trial. Second, the *Singer* approach is equitable. The fairness hearing ascertains whether the settlement is fair in light of the potential liability of the defendant and in light of the

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[12] Civ. No. 85-4302 (S.D. Ill. May 24, 1990) (publication pending), *reprinted at* Appendix F, at 69a-75a.

chances of recovery. Thus, the fairness hearing prevents other defendants from paying far in excess of their share of liability. Even under the one-satisfaction rule, fairness hearings need not become more complicated than they already are. Under the one-satisfaction [rule] no such apportionment ever needs to be made. Third, the *Singer* approach provides finality to the settlement. The settling defendants are no longer a part of the litigation, and thus large portions of the trial may be omitted. Under the *Franklin* approach, the settling defendants' liability needs to be determined, and thus their activities remain part of the trial. Fourth, the *Singer* approach encourages settlements, while the *Franklin* approach discourages settlements. Under *Singer*, the uncertainties of trial are increased, and thus parties are more likely to settle. Under Franklin, a party is guaranteed that it will never pay more than its share of the damages, thus decreasing the risks of trial.

Most importantly, the entire focus of the *Franklin* court is on fairness to the defendants. A court's role in approving a class action settlement is to insure that the settlement is fair to the absent class members. This does not give a court carte blanche to disregard the rights of non-settling defendants. However, in determining the effect of a bar order, the court must weigh the interests of both the non-settling defendants and the plaintiffs. The defendants are not absent; they have a full and fair opportunity to be represented by individual counsel. The defendants have the opportunity to protect themselves if it appears that the settlement will result in higher liability (either by objecting to the settlement or by entering into a settlement themselves). Furthermore, plaintiffs are prejudiced under the *Frank-*

lin approach. This approach allows the non-settling defendants to adopt a trial strategy of blaming the settling defendants for the plaintiff's injury in the hope that their share of the total liability will thus be smaller. . . .

> Another reason for adopting the *Singer* approach is that it is in line with state law. See Ill. Rev. Stat. ch. 70 § 302; Restatement (Second) of Torts § 885(3) (1979). Since most federal securities claims will also have pendent state law claims, an approach which is compatible with state law would be much easier to administer.

Dalton, App. at 72a-74a.

Similarly, *In re Atlantic Financial Management Inc. Securities Litigation,* 718 F. Supp. 1012, 1018 (D. Mass. 1988), follows *Singer* and explains the drawbacks of the Ninth Circuit's approach:

> Delaying final determination of the amount of the set-off deprives the plaintiff class of one of the chief inducements to settle: certainty. Particularly in class actions, this method generates significant practical difficulties as well, in that the indeterminate impact of any partial settlement would make it difficult to frame a notice to the class which fairly presents the merits of the proposed settlement. Furthermore, in complex securities litigation, the burden on the jury's time and perception is already considerable. To add to this burden the task of apportioning fault between absent and present defendants would obviate much of the advantage of partial settlement to the judicial system itself.

Finally, a Texas district court recently rejected the decision below in favor of a *Singer* pro tanto rule in *In re*

Terra-Drill Partnerships Securities Litigation, 726 F. Supp. 655, 656-57 (S.D. Tex. 1989).[13]

The decision below also conflicts with numerous federal decisions where courts, without specifically addressing the alternative of a proportionate reduction, apply a dollar-for-dollar credit to reduce a judgment for an amount obtained by settlement. *E.g., Miller v. Apartments & Homes of New Jersey, Inc.,* 646 F.2d 101, 110 (3d Cir. 1981) (reducing judgment *pro tanto* rather than *pro rata* in civil rights action); *Gould v. American-Hawaiian Steamship Co.,* 535 F.2d 761, 784 (3d Cir. 1976) (offsetting judgment in securities cases by amount of prior settlement); *Screen Gems — Columbia Music, Inc. v. Metlis & Lebow Corp.,* 453 F.2d 552, 554 (2d Cir. 1972) (same in copyright infringement action). The approach of these cases is flatly inconsistent with the Ninth Circuit's rule.

2. The Decision Below Revokes Joint And Several Liability And Should Be Reviewed

The Court of Appeals' decision should be reviewed because it contradicts Congress' determination that violators of the securities laws are jointly and severally liable. That principle is statutorily established in Section 11(f) of the 1933 Act of 1933, 15 U.S.C. § 77k(f). *See also* 15 U.S.C. §§ 77(o), 77t(a).

The right to contribution exists between "joint tortfeasors." *Restatement (Second) of Torts* § 886A, Comment b. Where two or more persons are joint tortfeasors, each is liable to the injured party for the *entire* harm. *Id.,* § 875. Contribution was created in equity not to modify

[13] *Terra-Drill* does not present precisely the same issue as presented here, as the district judge determined that the liability of the codefendants may not have been joint and several. It nevertheless illustrates the significance of the issue and the disagreement in the lower courts with the decision below.

the relationship between the injured party and joint tortfeasors, but to permit a joint tortfeasor who discharged the injured party's claim to recover any amount paid in excess of his equitable share from other joint tortfeasors.

The decision below oversteps proper judicial bounds by finding fault with, and judicially modifying, a statutorily mandated system in which a solvent defendant may be required to pay more than the amount for which it is "proportionally" responsible. The decision ignores the fact that as a joint tortfeasor, that defendant is liable for the *entire* harm. Thus, although the panel perceived that solvent non-settling defendants could be "forced" to pay "too much" by settlements, they in fact are obligated to pay that much if their co-defendants are insolvent.

Given this statutory regime of joint and several liability, equity requires that, when a reasonable and fair partial settlement is reached, the settling plaintiff not be penalized by forfeiting the benefits of joint and several liability. It is for these reasons, among others, that California and numerous other jurisdictions, following the leads of the Uniform Contribution Among Tortfeasors Act and Restatement, have adopted the rule urged by plaintiffs.

Indeed, the Uniform Contribution Among Tortfeasors Act was amended in 1955 precisely to conform with petitioners' position, having previously required a *pro rata* or proportionate fault reduction of a judgment.[14] The

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[14]That the earlier 1939 version of the Uniform Contribution Among Tortfeasors Act utilized a proportional fault approach is made clear by the express provision that "[w]hen there is such a disproportion of fault among the joint tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution, the relative degree of fault of the joint tortfeasors shall be considered in

National Conference of Commissioners on Uniform State Laws ("NCCUSL") adopted a *pro tanto* (offset) reduction and eliminated proportionate fault or *pro rata* reductions specifically because of the chilling effect on settlements of the proportional rule:

> The 1939 Act provided, in Section 5, that a release of any tortfeasor should not release him from liability for contribution unless it expressly provided for a reduction "to extent of the pro rata share of the released tortfeasor" of the injured person's recoverable damages. This provision has been one of the chief causes for complaint where the Act has been adopted, and one of the main objections to its adoption.
>
> * * *
>
> The effect of Section 5 of the 1939 Act has been to discourage settlements in joint tort cases, by making it impossible for one joint tortfeasor alone to take a release and close the file. Plaintiff's attorneys are said to refuse to accept any release which contains the provision reducing damages "to the extent of the pro rata share of the released tortfeasor," because they have no way of knowing what they are giving up. The "pro rata share" cannot be determined in advance of judgment against the other tortfeasors. In many cases the chief reason for settling with one rather than another is that they hope to get more from the party with whom they do not settle. A provision for a reduction in a fixed amount will not protect the settling tortfeasor from contribution.

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determining their pro rata shares." *Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Forty-Ninth Annual Conference* 244 (1939) (optional Section 2(4) recommended by draftsmen).

> No defendant wants to settle when he remains open to contribution in an uncertain amount, to be determined on the basis of a judgment against another in a suit to which he will not be a party. *Some reports go so far as to say that the 1939 Act has made independent settlement impossible.*

Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Annual Conference Meeting in its Sixty-Fourth Year 224 (1955) (emphasis added).

3. The Decision Below Discourages Settlement

The Ninth Circuit's decision thus plainly discourages settlements. By making partial settlements dangerous for plaintiffs, the decision permits one recalcitrant defendant to force an entire multi-defendant case to trial. For example, in the case below, if the Ninth Circuit's rule had been known from the outset, plaintiffs would not have settled with Kaypro and its eight officers and directors, forcing a jury trial of all 11 defendants upon an already busy district court. Under the *Singer* rule, Kaypro and the officers and directors would be out of the case, and at most, a two-defendant case would be tried. Moreover, Bache and Peat Marwick, facing the joint and several liability which Congress mandated, might well have settled subsequently, concluding the entire case. Under the Ninth Circuit's rule, no one would settle, but Bache and Peat Marwick would face the same joint and several liability at trial. Even if Peat Marwick also offered to settle, Bache could offer nothing, and force plaintiffs to choose between (a) settlements with all other defendants, running the risk of forfeiting much of their claim against Bache under the "proportional" reduction, or (b) a trial against eleven defendants, all but one of which are prepared to settle on terms plaintiffs find acceptable. Thus,

the rule below gives a recalcitrant defendant enormous leverage.

It should be noted that, under the Ninth Circuit's rule, even if a partial settlement were somehow forged, the trial would be made unnecessarily complex. Rather than simply trying Bache and Peat Marwick, and then applying a $9.25 million offset to the judgment, the parties would have to try, the court would have to instruct upon, and the jury would have to decide, not only whether Kaypro and each of eight officers and directors were *liable,* but also the *relative culpability* of each of them.[15] This would complicate an already protracted case. As the court pointed out in *Atlantic Financial Management*: "[I]n complex securities litigation, the burden on the jury's time and perception is already considerable. To add to this burden the task of apportioning fault between absent and present defendants would obviate much of the advantage of partial settlement to the judicial system itself." 718 F. Supp. at 1018.

The Ninth Circuit's cryptic discussion of this factor reflects a total misunderstanding of the issue. Although the court acknowledged that fostering settlement was important, it concluded that its rule *encouraged* settlements because "[d]efendants that are inclined to settle may do so without penalty or risk," App. at 21a. This comment, of course, begs the question, as the settling defendants obtain peace under either rule. The question presented is whether the "offset" rule or the "proportional liability" rule better fosters settlement, and the

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[15]It is unclear what legal standards would be applied in determining proportional fault of defendants. The jury would be left on its own to grapple with questions such as whether the Chief Financial Officer of Kaypro or its outside auditors are more responsible for a false financial statement.

answer is obvious. Plaintiffs are more likely to settle knowing what the offset will be, and defendants armed with the "wild card" jury issue of the "proportional liability" of defendants not present to defend themselves are less likely to settle. See *Dalton v. Alston & Byrd*, Civ. No. 85-4302 (S.D. Ill. May 24, 1990) (publication pending), *reprinted at* Appendix F.

B. *Certiorari* Should Be Granted To Resolve A Circuit Split Over Whether There Is An Implied Right To Contribution Among Joint Tortfeasors Under Section 12 Of The 1933 Act And Section 10(b) Of The 1934 Act

The instant case presented claims under Section 10(b) of the 1934 Act, Sections 11 and 12 of the 1933 Act, and state law. The court's discussion of the "proportional reduction" rule relies only upon Section 11(f) of the 1933 Act, but the opinion is sweeping in its language, and reiterates that there is an implied right of contribution under Section 10(b). Thus the court may well be read to impose this "proportional reduction" rule upon all of the federal claims at issue below.

The application of a "proportional reduction" rule, of course, presupposes that there is a right to contribution. The decision below explicitly states that there is such a right under Section 10(b), App. 8a-9a, and implicitly assumes such a right under Section 12. The Ninth Circuit's holding that there is an implied right to contribution among defendants pursuant to Section 10(b) conflicts irreconcilably with this Court's most analogous decisions in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), and *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77 (1981), and is in conflict with the law of other Circuits.

In *Texas Industries* and *Northwest Airlines* this Court held that federal courts may not imply a right to contribution in federal statutes if Congress did not intend to provide for one. In *Texas Industries* the Court held that no implied right of action exists under either the Sherman or the Clayton antitrust acts, because those acts "were not adopted for the benefit of the participants in a conspiracy to restrain trade." 451 U.S. at 639. Similarly *Northwest Airlines* held that contribution is not available under either the Equal Pay Act of 1983 or Title VII of the Civil Rights Act of 1964 because those statutes were not enacted for the benefit of employers. 451 U.S. at 92. The same rationale prohibits contribution under Section 10(b), a part of the 1934 Act which "was designed to protect investors against manipulation of stock prices," not to protect those who defraud the investors by manipulating the stock prices. *Basic Inc. v. Levinson*, 485 U.S. 224, 230 (1988). The 1933 Act provides for contribution under certain strictly limited circumstances pursuant to Section 11(f), and there is no basis for extending Section 11(f) beyond the single instance where it was intended to apply — to Section 11 liability *which is strict liability, not founded upon a showing of fault. Herman & MacLean v. Huddleston*, 459 U.S. 375, 381-82 (1983).

The decision of the Ninth Circuit on this issue is not only in conflict with this Court's decisions in *Northwest Airlines* and *Texas Industries*, but is contrary to the law in other circuits. Although several courts initially found an implied right to contribution under Section 10(b) (and under other securities provision, such as Section 12 of the 1933 Act),[16] the majority of the recent cases have rejected these holdings, relying upon *Texas Industries* and *North-*

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[16]*E.g., Tucker v. Arthur Andersen & Co.*, 646 F.2d 721, 727 (2d Cir. 1981); *Heizer Corp. v. Ross*, 601 F.2d 330, 331-34 (7th Cir. 1979);

west Airlines.[17] Indeed, the very authority cited by the Ninth Circuit here to hold that there is a right to contribution under Section 10(b), *Heizer Corp. v. Ross*, 601 F.2d 330 (7th Cir. 1979), is no longer law in the circuit where it was rendered. *See* App. at 9a. The Seventh Circuit itself repudiated *Heizer's* reasoning in *King v. Gibbs*, 876 F.2d 1275 (7th Cir. 1989). "*King* annulled the

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Globus v. Law Research Service, Inc., 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971).

[17] *See e.g., Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101, 1104-06 (4th Cir. 1989) (holding that the analysis of *Texas Industries* and *Northwest Airlines* overrules the Fourth Circuit's prior holding in *Wassel v. Eglowsky*, 542 F.2d 1235 (4th Cir. 1976) that contribution is available as to actions under section 12(2) of the 1933 Act); *Robin v. Doctors Officenters Corp.*, 730 F. Supp. 122, 123-25 (N.D. Ill. 1989) (holding that the analysis of *Texas Industries* and *Northwest Airlines* overrules the Seventh Circuit's prior holding in *Heizer Corp. v. Ross*, 601 F.2d 330, 331 (7th Cir. 1979), that contribution is available as to actions under Section 10(b) of the 1934 Act); *Eastern Holdings, Inc. v. Illinois Co. Investments*, No 88. C 7108 (N.D. Ill. July 18, 1989) (Westlaw, 1989 WL 85027, *3) (1989 U.S. Dist., LEXIS 8515) (same); *First Financial Savings Bank, Inc. v. American Bankers Insurance Co.*, [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) § 94, 827, at 94, 453-54 (E.D.N.C. 1989) (applying *Texas Industries* and *Northwest Airlines* to hold that no right to contribution may be implied as to actions under Section 10(b); *Nelsen v. Craig-Hallum, Inc.*, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,500, at 93, 192-93 (D. Minn. 1989) (same); *In re Professional Financial Management, Ltd.*, 683 F. Supp. 1283, 1285-87 (D. Minn. 1988) (applying *Texas Industries* and *Northwest Airlines* to hold that no right to contribution may be implied as to actions arising under Section 12(2) of the 1933 Act or Section 10(b) of the 1934 Act); *see also Delta Holdings, Inc. v. National Distillers & Chemical Corp.*, [1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,910, at 94,426 (S.D.N.Y. 1986) (no contribution under Section 12(2)); *Odette v. Shearson, Hammill & Co.*, 394 F. Supp. 946, 956 (S.D.N.Y. 1975) (same).

reasoning in *Heizer*."[18] Applying the analysis mandated by this Court in *Texas Industries* and *Northwest Airlines*, courts in the Seventh Circuit now hold that "[n]o private cause of action for contribution may be implied under Rule 10b-5" or Section 10(b). *Robin*, 730 F. Supp. at 125.

The Ninth Circuit's blind adherence to the older authorities on this issue provides a stark contrast to the careful analysis of the Fourth Circuit in *Baker* just three months earlier. In that case, the Fourth Circuit found no implied right to contribution under Section 12 of the 1933 Act, reasoning that the statute itself does not create a right to contribution. "Indeed, the statute's protection extends to investors who purchase securities based on misleading statements of material fact; it is not solicitous of unsuccessful defendants in a federal securities action." 876 F.2d at 1105. Further, the "legislative history and the structure of the federal securities laws do not suggest the recognition of implied rights of contribution and indemnification." Notably, of the eight provisions which expressly grant a private cause of action under the 1933 Act and the 1934 Act, only three contain a right to contribution. Lowenstein, *Implied Contribution Under the Federal Securities Laws: A Reassessment*, 1982 Duke L. J. 543, 550; *accord Robin v. Doctors Officenters Corp.*, 730 F. Supp. at 125. There is no ground for extending the contribution provision of Section 11(f) to Section 10(b) or Section 12, and this Court should resolve the circuit split on this issue.[19]

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[18]*Robin v. Doctors Officenters Corp.*, 730 F. Supp. 122, 124 (N.D. Ill. 1989); *accord, e.g., Eastern Holdings, Inc. v. Illinois Co. Investments*, No. 88 C 7108 (N.D. Ill. July 18, 1989) (Westlaw, 1989 WL 85027, *3; 1989 U.S. Dist. LEXIS 8515).

[19]Even if this Court chooses not to take this case for a full consideration of the merits, petitioners respectfully submit that it

If the Court determines that there is no right to contribution under Section 10(b), that will permit plaintiffs to effect partial settlements without risking the viability of their Section 10(b) claims. If, however, the Court finds an implied right to contribution under Section 10(b) or Section 12, the Court can also resolve the question presented in Section A, *supra*, for purposes of Section 10(b) — the extent to which a partial settlement which bars cross-claims for contribution must reduce the liability of non-settling defendants.

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would be appropriate simply to vacate the opinion below and remand with instructions to reconsider the holding in light of *Texas Industries* and *Northwest Airlines*.

III.

CONCLUSION

The petition should be granted on all issues.

DATE: July 5, 1990

Respectfully submitted,

MILBERG WEISS BERSHAD
SPECTHRIE & LERACH
WILLIAM S. LERACH
LEONARD B. SIMON
(Counsel of Record)
BLAKE M. HARPER
HELEN J. HODGES
ERIC A. ISAACSON

LEONARD B. SIMON
Counsel of Record for Petitioners

225 Broadway, Suite 2000
San Diego, CA 92101
Telephone: 619/231-1058

WOLF POPPER ROSS WOLF & JONES
MICHAEL P. FUCHS
PATRICIA I. AVERY
845 Third Avenue
New York, NY 10022
Telephone: 212/759-4600

ABBEY & ELLIS
ARTHUR N. ABBEY
212 East 39th Street
New York, NY 10016
Telephone: 212/889-3700

SCHOENGOLD & SPORN, P.C.
SAMUEL P. SPORN
233 Broadway
New York, NY 10279
Telephone: 212/964-0046

LAW OFFICES OF JOSEPH H. WEISS
JOSEPH H. WEISS
319 Fifth Avenue
New York, NY 10016
Telephone: 212/532-4171

WOLF HALDENSTEIN ADLER
FREEMAN & HERZ
DANIEL W. KRASNER
FRED TAYLOR ISQUITH
270 Madison Avenue
New York, NY 10016
Telephone: 212/545-4600

Counsel for Petitioners

APPENDIX A

[884 F.2d 1222]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE FRANKLIN, On Behalf of Himself and All Others Similarly Situated, *Plaintiffs,*

v.

KAYPRO CORPORATION; ANDREW F. KAY; DAVID KAY; ALLAN M. KAY; MARY M KAY; PRUDENTIAL-BACHE SECURITIES, INC., *Defendants.*

In re KAYPRO CORPORATION, SHAREHOLDER LITIGATION.

PRUDENTIAL-BACHE SECURITIES, INC., *Defendant-Cross-claimant-Appellant,*

v.

KAYPRO CORPORATION; ANDREW F. KAY; DAVID A. KAY; ALLAN M. KAY, *Plaintiffs-Cross-claimants-Appellees.*

In re KAYPRO CORPORATION SECURITIES LITIGATION.

GEORGE FRANKLIN, On Behalf of Himself and All Others Similarly Situated, JON QUINT; ELLEN QUINT; STEFAN REZNIK; WILLIAM B. WEINBERGER; RICHARD LOWE; PAUL L. HOLMES; EVELYN S. HOLMES, *Plaintiffs-Appellees,*

v.

KAYPRO CORPORATION; ANDREW F. KAY; DAVID A. KAY; ALLAN M. KAY; MARY M. KAY; ARTHUR B. LAFFER; BRADFORD W. RYLAND; LUDWIG WEINDLING; ROGER S. WOOLEY, *Defendants-Appellants,*

v.

PEAT MARWICK MAIN & COMPANY, *Defendant-Appellant.*

C.A. Nos. 88-5931, 88-5934.
D.C. No. CV-84-2091-N
Argued and Submitted Feb. 7, 1989.
Decided Sept. 6, 1989.

J. Anthony Sinclitico, III, Gibson, Dunn & Crutcher, San Diego, Cal., and John A. Shutkin, New York City, for defendants-appellants.

Stephen Young, Robert D. Feighner, and Ben Suter, Keesal, Young & Logan, San Francisco, Cal., for defendant-cross-claimant-appellant.

William S. Lerach, Milberg, Weiss, Bershad, Specthrie & Lerach, San Diego, Cal. and Michael P. Fuchs, Wolf Popper Ross Wolf & Jones, New York City, for plaintiffs-defendants-cross-claimants-appellees.

Appeal from the United States District Court for the Southern District of California.

Before FARRIS, FERGUSON and BEEZER, Circuit Judges.

BEEZER, Circuit Judge:

This is an appeal from a pretrial order by the district court approving settlement with some but not all defendants in a securities action. The class action consists of cases consolidated as *In re Kaypro Shareholders Securities Litigation,* No. 84-2091-N(I). The plaintiff class includes all persons, except defendants, who acquired common stock of Kaypro Corporation between August 25, 1983 and July 17, 1984. The defendants are Kaypro Corporation, eight of its officers and directors, Peat Marwick Main & Company, and Prudential-Bache Securities, Inc., named in its corporate capacity and as the representative of a class of underwriters. Because substantial legal rights of Prudential-Bache and Peat Marwick are affected by the district court's order, they have standing to appeal. *Waller v. Financial Corp. of America,* 828 F.2d 579, 583 (9th Cir. 1987). We have jurisdiction pursuant to rule 54(b) of the Federal Rules

of Civil Procedure, and we affirm in part and remand in part.

I

The plaintiffs' complaint alleges that on August 25, 1983, Kaypro commenced an initial public offering of four million shares of Kaypro common stock at the price of ten dollars per share. The complaint further alleges that between August 25, 1983 and July 17, 1984 the defendants distributed false and misleading statements and reports concerning Kaypro.

On July 17, 1984 Kaypro released its third quarter earnings report showing essentially flat earnings. In September 1984 Kaypro reported that it was unable to locate or account for inventory valued at several million dollars. Kaypro's 1984 Annual Report indicated that a twenty million dollar operating profit reported for the first nine months of the year was completely eliminated by accounting adjustments. As these and other adverse facts became known, the market price of Kaypro's common stock fell to between two and three dollars per share.

After the initial complaints were filed, the district court considered the sufficiency of the complaints, and certification of the plaintiff stock purchaser and defendant underwriter classes. The parties also undertook document and interrogatory discovery. After certifying the classes and consolidating the complaints, the district court ordered status and settlement hearings before a magistrate. After extended hearings and negotiations, the plaintiff class signed a stipulation of settlement with Kaypro and its officers and directors ("settling defendants"). Prudential-Bache and Peat Marwick ("nonsettling defendants") participated in settlement hearings but declined to join the settlement.

The plaintiffs' consolidated amended complaint seeks a damage judgment for $25 million. An analysis commissioned by the plaintiffs indicated theoretical damage of between $19 million and $22 million. Peat Marwick asserted in a settlement statement that the total damage figure did not exceed $5 million. The plaintiffs and the settling defendants agreed to settle for $9.25 million.

On October 19, 1987 the magistrate conducted a good faith hearing on the settlement. The nonsettling defendants filed briefs and participated in the hearing. After briefing and hearings extending over two months, the magistrate issued proposed findings of fact and a recommended final judgment and order of dismissal declaring that the settlement was made in good faith.

The nonsettling defendants moved for *de novo* review by the district court. After conducting its own hearing, the district court adopted the findings and conclusions of the magistrate. Both the magistrate and the district court conducted a good faith hearing in accordance with procedures specified in sections 877 and 877.6 of the California Code of Civil Procedure.[1] The nonsettling defendants now appeal and claim that the order approving settlement was impermissibly entered.

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[1]Section 877 reads [*sic*]:

Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort, or to one or more other co-obligors mutually subject to contribution rights, it shall have the following effect:

(a) It shall not discharge any other such party to whom it is given from all liability for any contribution to any other parties.

(b) It shall discharge the party to whom is is given from all liability for any contribution to any other parties.

A proposed partial settlement of complex, class action litigation involving the potential for substantial damages raises a number of concerns. Trial courts in which litigation is pending have a natural desire to clear court dockets of complex litigation in as expeditious a manner

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(c) This section shall not apply to co-obligors who have expressly agreed in writing to an apportionment of liability for losses or claims among themselves.

Section 877.6 provides:

(a) Any party to an action wherein it is alleged that two or more parties are joint tortfeasors or co-obligors on a contract debt shall be entitled to a hearing on the issue of the good faith of a settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasors or co-obligors, upon giving notice thereof in the manner provided in Sections 1010 and 1011 at least 20 days before the hearing....

(b) The issue of the good faith of a settlement may be determined by the court on the basis of affidavits served with the notice of hearing, and any counteraffidavits filed in response thereto, or the court may, in its discretion, receive other evidence at the hearing.

(c) A determination by the court that the settlement was made in good faith shall bar any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault.

(d) The party asserting the lack of good faith shall have the burden of proof on that issue.

(e) When a determination of good faith or lack of good faith of a settlement is made, any party aggrieved by the determination may petition the proper court to review the determination by writ of mandate. The petition for writ of mandate shall be filed within 20 days after service of written notice of the determination, or within such additional time not exceeding 20 days as the trial court may allow.

as possible. This desire, however, is tempered by the need to assure factual fairness and the correct application of legal principles. *See* Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference,* 33 UCLA L.Rev. 485, 486-90 (1985).

In general, the policy of federal courts is to promote settlement before trial. "Since it obviously eases crowded court dockets and results in savings to the litigants and the judicial system, settlement should be facilitated at as early a stage of the litigation as possible." Fed.R.Civ.P. 16(c) advisory committee note; *see* Fed.R.Evid. 408 advisory committee note ("public policy favor[s] the compromise and settlement of disputes"). Settlement conferences are incorporated by rule into pretrial conferences. Fed.R.Civ.P. 16(c). In class actions such as this, a settlement requires the approval of the court. Fed.R.Civ.P. 23(e); *see* Note, *Abuse in Plaintiff Class Action Settlements: The Need for a Guardian During Pretrial Settlement Negotiations,* 84 Mich.L.Rev. 308, 320-25 (1985) (discussing court supervision of settlements).

An overwhelming majority of class action suits settle before reaching trial. One study indicated that seventy-one percent of such suits filed settled before trial. Jones, *An Empirical Examination of the Resolution of Shareholder Derivative and Class Action Lawsuits,* 60 B.U.L.Rev. 542, 544-47 (1980). The reasons for this are quite understandable. Litigation settlements offer parties and their counsel relief from the burdens and uncertainties inherent in trial. In class action litigation, plaintiffs' counsel may be encouraged to enter settlement with some defendants to obtain financial resources with which to assure payment of the costs of continuing litigation against the remaining defendants. The plaintiffs and the class they represent may view some recovery by way of

settlement more favorably than the risk of recovering nothing. Even if liability is considered certain, the present value of money received in settlement may be greater than the value of a judgment entered at some future date. Some defendants may pay a negotiated settlement sum in order to avoid litigation costs or to hedge against the risk of an excessive adverse damage verdict. The economics of litigation are such that pretrial settlement may be more advantageous for both sides than expending the time and resources inevitably consumed in the trial process.

In spite of its attractiveness, obtaining a settlement in multi-party litigation may be quite complex. The facts specified in the pleadings may give rise to cross claims or counterclaims based on contribution or indemnity. In such cases, settling defendants cannot obtain finality unless a "bar order" is entered by the court. In essence, a bar order constitutes a final discharge of all obligations of the settling defendants and bars any further litigation of claims made by nonsettling defendants against settling defendants.

The settlement agreement at issue in this appeal is expressly conditioned on obtaining an order from the district court that the nonsettling defendants' rights to contribution are satisfied and that further contribution is barred.[2] The bar order was issued after hearings before a

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[2]The settlement agreement reads:

E. The Good Faith Hearing

> (i) Promptly after execution of this Stipulation, the parties hereto shall jointly move the Court for an order and judgment (the "Good Faith Order"), . . . providing, *inter alia,* (a) that the settlement embodied in this Stipulation is entered into and made in good faith, within the meaning of Sections 877 and 877.6 of the California Code of Civil Procedure, and (b) that all claims

magistrate and the district court. The nonsettling defendants argue that the bar order impermissibly infringes their right to full contribution from the settling defendants. The appeal poses a question of first impression.

II

Subsection 11(f) of the Securities Act of 1933, now codified at section 77k(f) of Title 15 of the United States Code, provides for a right of contribution among those defendants who are found jointly and severally liable in certain securities actions.

> (f) All or any one or more of the persons specified in subsection (a) of this section shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

15 U.S.C. § 77k(f). Subsection 11(f), in turn, was taken "almost bodily" from England's Companies Act 1929. 3 L. Loss, Securities Regulation 1737 (1961); *see* Companies Act, 1929, 19 & 20 Geo. 5, ch. 23, § 37(3).[3] Contribution is

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for contribution or indemnification, however denominated, against the Settling Defendants arising under the federal securities laws or state law in favor of persons, including Non-Settling Defendants, who are asserted to be joint tort-feasors with the Settling Defendants in Settled Claims and based upon liability in the Settled Claims are extinguished, discharged, satisfied and/or otherwise unenforceable.

[3]The Companies Act 1929 attached liability only to directors and persons who prepared the prospectus: section 11 of the Securities Act goes on to attach liability to underwriters. Dooley, *The Effect of Civil*

not limited to section 11(f) of the 1933 Act. Sections 9(e) and 18(b) of the Securities Exchange Act of 1934 also provide for contribution.[4] Furthermore, it has been determined that a right to contribution exists under claims based on section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities Exchange Commission's rules, 17 C.F.R. § 240.10b-5. *See, e.g., Heizer Corp. v. Ross,* 601 F.2d 330, 334 (7th Cir.1979).

There is no question that the *right* to contribution is governed by federal law. In *Laventhol, Krekstein, Horwath & Horwath v. Horwitch* we recognized that "[section] 77k(f) has said it all." 637 F.2d 672, 675 (9th Cir.1980), *cert. denied,* 452 U.S. 963, 101 S.Ct. 3114, 69 L.Ed.2d 975 (1981). In *Smith v. Mulvaney* we went on to hold that contribution, as guaranteed by section 77k(f), is not pro rata, but is based instead on the actual relative culpabilities of the tortfeasors. 827 F.2d 558, 561 (9th Cir.1987).

Merely saying, however, that cotortfeasors have a right to contribution based on relative culpability says very little. The federal securities laws do not specify how the contribution right applies in the case of a partial settlement. Nor are there any other well-established standards in this area. Early American and English common law had a rule *against* contribution among joint tort feasors. This rule sprang from the case of *Merryweather v. Nixan,*

Liability on Investment Banking and the New Issues Market, 58 Va.L.Rev. 776, 793 (1972).

[4]The language is almost identical to that used in section 11(f):

> Every person who becomes liable to make payment under this [sub]section may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment.

15 U.S.C. § 78i; 15 U.S.C. § 78r.

101 Eng.Rep. 1337 (1799). Early American courts applied the rule only to cases of willful misconduct; however, once procedural rules were changed to allow joinder of persons who had negligently caused the same damage, courts began to apply the rule generally. W. Keeton, D. Dobbs, R. Keeton and D. Owen, Prosser & Keeton on the Law of Torts § 50, at 337 (5th ed. 1984). By the beginning of this century, the rule had become entrenched in nearly every jurisdiction.

The extension of the rule against contribution to negligent tort feasors engendered much criticism.[5] The rule was criticized as enormously unfair and for facilitating collusion between plaintiffs and wrongdoers. *See Skinner v. Reed-Prentice Division Package Machinery Co.,* 70 Ill.2d 1, 13, 15 Ill.Dec. 829, 834, 374 N.E.2d 437, 442 (1977), *cert. denied,* 436 U.S. 946, 98 S.Ct. 2849, 56 L.Ed.2d 787 (1978). In 1939 the American Law Institute proposed a Uniform Contribution Among Tortfeasors Act.[6] An

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[5]Nearly a hundred years after the *Merryweather* case was decided, and nearly one hundred years before our current decision, Professor Reath wrote:

> It is singularly unfortunate, and has led to misunderstanding, that *Merryweather v. Nixan* should have been continually treated as stating the "general rule." As a matter of fact, that case states not the rule, but the exception. The general rule is that among persons jointly liable the law implies an assumpsit either for indemnity or contribution, and the exception is that no assumpsit, either express or implied, will be enforced among wilful tortfeasors or wrongdoers.

Reath, *Contribution Between Persons Jointly Charged for Negligence — Merryweather v. Nixan.* 12 Harv.L.Rev. 176, 177 (1898).

[6]This came on the heels of England's Law Reform (Married Women and Tortfeasors) Act of 1935, 25 & 26 Geo. 5, ch. 30, § 6, which abolished the rule against contribution.

amended Uniform Act was proposed in 1955. By the 1970s, "half a century of vigorous attack upon the original rule [ ] had its effect in the passage of statutes in most states, which to a greater or lesser extent permit contribution among tortfeasors." Prosser, § 50, at 338.

In short, contribution was not part of the early American common law, and in fact was actively disapproved by the courts. It has been resurrected jurisdiction by jurisdiction. Many states have adopted the Uniform Act, some have created their own statutory scheme, and a few have adopted contribution through judicial decree.[7] Far from vanishing, *see* Reath, *supra* note 5, at 178, contribution has become a vibrant and complex facet of the law.

Against this general background can be viewed the development of contribution in federal securities law. As with contribution in state jurisdictions, it is the product of a statutory mandate. Unlike most state schemes, however, section 77k(f) is not supported by any statutory or regulatory infrastructure, nor is there a large body of case law. Congress has not enacted the Uniform Contribution Among Tortfeasors Act or provided any other statutory guidance.

The legislative history of section 11(f) of the Securities Act is very sparse. *See* Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting Conspiracy in Pari Delicto, Indemnification and Contribution,* 120 U.Pa.L.Rev. 597, 650 & n. 236 (1972). It is clear, however, that Congress intended the section to complement the overall purposes of the act. The overarching purpose of the Securities Act of 1933, and of the subsequent Securi-

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[7]See ABA Antitrust Section, Contribution and Claim Reduction in Antitrust Litigation 6 & nn. 37-39 (1986) (listing sources of contribution rights in 39 states and District of Columbia).

ties Exchange Act of 1934, was to restore confidence in the market. Confidence was to be restored by forcing the public disclosure of facts sufficient to permit prudent investors to understand the risks assumed when purchasing a security offered for sale to the public. One of the most important changes brought about by the legislation was that it made accountable *all* parties who were responsible for public reports. *See* H.R.Rep. No. 85, 73d Cong., 1st Sess. 9 (1933); Scott, *Resurrecting Indemnification: Contribution Clauses in Underwriting Agreements,* 61 N.Y.U.L.Rev. 223, 234-38 (1986).

Much of the early attention paid to the new federal right to contribution focused on the phrase "as in cases of contract." This phrase was also found in the English statute; its inclusion there was most likely intended to eliminate problems that then[8] existed in English tort law. *See* Douglas & Bates, *The Federal Securities Act of 1933,* 43 Yale L.J. 171, 178 & n. 30 (1933). Reliance on this phrase, however, is not helpful to the student of contribution. In one of the two opinions we have issued on section 77k(f) we wrote that "Congress more likely intended the phrase 'as in cases of contract' to express a departure from the traditional no contribution rule of tort law." *Smith,* 827 F.2d at 561. Since we recognize the doctrine of contribution among joint tortfeasors in securities cases, we must determine the source of law to be applied in the context of a pretrial settlement reached by some but not all defendants.

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[8]The rule against contribution was not statutorily overridden in England until 1935. *See supra* note 6.

III

The nonsettling defendants concede that there is no statutory provision and no established federal common law which provides an easy resolution to this appeal. *Cf. Herzfeld v. Laventhol, Krekstein, Horwath & Horwath,* 378 F.Supp. 112, 135 (S.D.N.Y.1974) (describing federal parameters as a "vacuum"), *modified on other grounds,* 540 F.2d 27 (2d Cir.1976). That contribution is a complex matter can be illustrated merely by thumbing through the hundreds of pages in a treatise such as *American Jurisprudence Second* that elucidate state-law rights to contribution. That our two prior decisions, *Laventhol* and *Smith,* do not provide full guidance is amply demonstrated by the fact that both sides vigorously argue that both opinions support them.

In this vacuum, courts have adopted a variety of approaches to partial pretrial settlements. A number of district courts have, as in this case, adopted the law of the forum state. *E.g., Kirkorian v. Borelli,* 695 F.Supp. 446 (N.D.Cal.1988); *Herzfeld,* 378 F.Supp. at 135. Use of forum state law has several advantages. The courts and the parties are given a comprehensive body of applicable law.[9] Federal and state claims in a given lawsuit can be decided uniformly. *See First Federal Savings & Loan v. Oppenheim, Appel & Dixon,* 631 F.Supp. 1029, 1036 (S.D.N.Y. 1986). These qualities are not taken lightly. We feel, however, that the disadvantages are greater. Not all forums have laws governing contribution. *See Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO,* 451 U.S. 77, 87 n. 17, 101 S.Ct. 1571, 1578 n. 17,

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[9]In this case, for example, the section 877.6 good faith hearing has been thoroughly explicated by the California Supreme Court in *Tech-Bilt, Inc. v. Woodward Clyde & Assocs.,* 38 Cal.3d 488, 698 P.2d 159, 213 Cal.Rptr. 256 (1985).

67 L.Ed.2d 750 (1981) (Thirty-nine states and the District of Columbia allow contribution.) Nor are laws governing contribution uniform: some states adopted the Uniform Act, some created their own statutory scheme, and some adopted contribution through judicial fiat. *See id.* Furthermore, even those forums that have identical statutory language will diverge when their courts interpret and refine the laws. Such an environment would be chaotic to both litigants and courts. Results would be disparate and forum shopping would be rampant.

We agree, therefore, with those courts that have called for the creation of federal common law to govern this issue.[10] *See, e.g., Singer v. Olympia Brewing Co.,* 878 F.2d 596, 599 (2d Cir.1989); *In re Sunrise Securities Litigation,* 698 F.Supp. 1256, 1257 (E.D.Pa.1988). Partial settlements and bar orders affect substantive rights that are the province of federal courts in securities actions.[11] *Compare Wolf v. Frank,* 477 F.2d 467, 479 (5th Cir.)

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[10]It is important to distinguish an action under the securities law from an action under, for example, civil rights laws. The Supreme Court has held that there can be no federal common law governing contribution in civil rights actions because there is no federal right to contribution in the first place. In securities law there is a statutorily created right to contribution; it is analogous to federal antitrust laws. However, because Congress has not yet created laws governing the right it created, the federal courts are free to fashion a common law. *See Texas Indus., Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630, 638-646, 101 S.Ct. 2061, 2065-2070, 68 L.Ed.2d 500 (1981).

[11]"Whether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy 'dependent on a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law.' " *United States v. Kimbell Foods, Inc.,* 440 U.S. 715, 728, 99 S.Ct. 1448, 1458, 59 L.Ed.2d 711 (1979) (quoting *United States v. Standard Oil Co.,* 332 U.S.. 301, 310, 67 S.Ct. 1604, 1609, 91 L.Ed. 2067 (1947)).

(federal law governs substantive issue of prejudgment interest), *cert. denied*, 414 U.S. 975, 94 S.Ct. 287, 38 L.Ed.2d 218 (1973) *with Wood v. Combustion Eng'g, Inc.*, 643 F.2d 339, 341-42 (5th Cir.1981) (state law governs procedural issue of applicable statute of limitations).

IV

As a basis for establishing the federal common law, the parties and the federal decisional law present us with three alternatives. We discuss each in turn.

The nonsettling defendants urge us to prohibit settlements that bar further contribution. They contend that contribution is a statutorily vested right that cannot be divested before a full trial. They argue that, even if our prior decisions do not define the contours of contribution, they at least prohibit bars to further contribution before a full trial. Nonsettling defendants read too much into the decisions. There is nothing in either the statute or our prior decisions that says contribution cannot be satisfied prior to a full trial. *See In re Nucorp Energy Securities Litigation*, 661 F.Supp. 1403, 1408 (S.D.Cal.1987). In *Laventhol*, although we did hold that that particular settlement agreement could not be enforced, we noted that "[i]f it could be said that [the settling defendants'] settlement with the plaintiff class had resulted in their bearing their proper share of damages, the case might be different." 637 F.2d at 675[12].

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[12]In *Herzfeld v. Laventhol, Krekstein, Horwath & Horwath*, the Second Circuit found that a settling defendant that paid more than its fair share in a partial settlement "removed itself from the category of a tort-feasor defendant" and was no longer subject to contribution. 540 F.2d 27, 38 (2d Cir.1976). As we explain later in this opinion, the scheme we now adopt would *not* require any proof of good faith beyond that required by Rule 23.

Smith came to us in a different procedural posture: we were asked to review a summary judgment in favor of settling defendants. We found "that the evidence on which the trial court based its decision fail[ed] to support adequately a conclusive finding that the settling defendants paid their proper share of damages." 827 F.2d at 561.

The nonsettling defendants simplistic approach would preclude partial pretrial settlement.[13] In *Laventhol* we noted that the "right of contribution is enunciated clearly [in section 77k(f)]; the statute is silent as to the encouragement of settlements." 637 F.2d at 675. The nonsettling defendants seize upon this silence as evidence that settlement should be discouraged. The nonsettling defendants read too much into the silence. As we have noted before, "it hardly seems necessary to point out that there is an overriding public interest in settling and quieting litigation. This is particularly true in class action suits. . . ." *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir.1976). The Southern District of California explained why not allowing contribution rights to be satisfied before trial would eliminate partial settlements:

> [I]f the non-settling defendants' construction is correct then partial settlement of any federal securities question before trial is, as a practical matter, impossible. Any single defendant who refuses to settle, for whatever reason, forces all others to trial. Anyone foolish enough to settle without barring contribution is courting disaster. They are allowing the total damages from which their ultimate share will be

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[13]The nonsettling defendants' argument also ignores the primary purpose of section 11(f), which is to punish every wrongdoer, and instead elevates a corollary of the purpose, which is that wrongdoers may seek contribution from one another.

derived to be determined in a trial where they are not even represented.

Nucorp Securities Litigation, 661 F.Supp. at 1408.

In short, we do not believe that Congress intended to preclude partial settlements, nor do we think Congress intended the right to contribution to be inextinguishable. Therefore, we decline to prohibit orders that bar further contribution.

A second alternative is suggested by the Second Circuit. *Singer v. Olympia Brewing Co.*, 878 F.2d 596 (2d Cir.1989). Under this scheme the settlement payment acts as an offset: the entire amount of damage is determined at a full trial, the settlement amount is deducted from that amount, and the nonsettling defendants are required to pay the remainder.

The strongest argument for adoption of this rule is that it adheres to the one satisfaction rule. "It is a fundamental legal principle that an injured party is ordinarily entitled to only one satisfaction for each injury." *U.S. Indus., Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1236 (10th Cir.1988). Because the settlement amount is merely offset from the total amount, the combined amounts paid by the settling defendants and by the nonsettling defendants can never be larger than the total amount of damages sustained by the plaintiffs.[14] For reasons we explain later, we think this advantage is illusory.

There are several disadvantages to this scheme. Plaintiffs may be tempted to engage in collusion with certain defendants. By accepting a low partial settlement, plaintiffs would be able to fund further litigation with no

[14]Unless, of course, the settlement amount is larger than the total amount of damages determined at trial.

diminution of the total amount eventally received. Similarly, plaintiffs could effect low settlements with defendants who had limited resources, and thereby *force* wealthier defendants to pay more than if all parties proceeded to trial.[15]

Some argue that a good faith hearing prevents these evils. We disagree. In the first place, a good faith hearing "means bogging down the settlement process in a miniature trial before trial." *Donovan v. Robbins*, 752 F.2d 1170, 1181 (7th Cir.1985). In order to be truly efficacious, the good faith hearing would require a full evidentiary hearing on all of the parties' relative culpabilities. This would negate many of the benefits of settlement.

Futhermore, the very dynamics of settlement guarantee that, even with a good faith hearing, the offset scheme forces nonsettling defendants to pay more than the amount for which they are culpable. Settlement is attractive to parties because it reduces litigation costs. Therefore, plaintiffs are willing to settle for less than they might receive if a claim were fully litigated.[16] *See* Elliot, *Managerial Judging and the Evolution of Procedure*, 53

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[15]If the total amount of damages determined at trial is T, the settling defendants relative culpability is S, and the nonsettling defendants relative culpability is N, then $S + N = T$. T remains constant. Thus, if settling defendants pay any amount less than S, that amount *must* be added to the amount paid by nonsettling defendants. $(S - x) + (N + x) = T$.

[16] Settlements offer other benefits that might induce plaintiffs to accept smaller amounts.

> Settlements are desirable, not just because trials are costly... but because settlements allow parties to "manage their own disputes" and avoid the uncertainties and limitations of the winner-take-all, imposed decisions that courts make in fully litigated cases. Settlement also offers privacy to litigants and

U.Chi.L.Rev. 306, 332-33 (1986). Courts are instructed to allow this discounting when determining whether a partial settlement was entered in good faith. *See Tech-Bilt, Inc. v. Woodward-Clyde & Assocs.*, 38 Cal.3d 488, 499, 698 P.2d 159, 166, 213 Cal.Rptr. 256, 263 (1985) (explaining Cal.Code Civ.P. § 877.6); *Manual for Complex Litigation 2d* § 30.44 (1986) (discussing Fed.R.Civ.P. 23). Plaintiffs are willing to forego this money, and courts correctly approve the discount. Nonetheless, under the offset scheme, nonsettling defendants are forced to pay to plaintiffs the amount of the discount.

In *Smith v. Mulvaney*, we were asked to determine whether the right to contribution should be apportioned on the basis of relative culpability or on a pro rata basis. 827 F.2d at 559. We found that "[c]ontribution is an equitable doctrine. To apportion damages without regard to fault reduces, to an extent, the equity which the doctrine was intended to provide." *Id.* at 561. Although we do not lose sight of the fact that we are speaking of equities between wrongdoers, we decline to back away from our goal of equity.

We need not do so. The final alternative, expounded by the Eastern District of Pennsylvania in *In re Sunrise Securities Litigation*, 698 F.Supp. 1256 (E.D.Pa.1988), satisfies the three goals we have discussed above: the statutory goal of punishing each wrongdoer, the equitable goal of limiting liability to relative culpability, and the policy goal of encouraging settlement.

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enables them to consider opportunities for resolutions that would not be available in a trial judgment.

D. Provine, Settlement Strategies for Federal District Judge 1-2 (1986).

This scheme contemplates a partial settlement approved by the district court under Rule 23. Nonsettling defendants are then barred from further rights of contribution from the settling defendants. At trial, the jury is asked not only to determine the total dollar damage amount, but also the percentage of culpability of each of the nonsettling defendants as well as that of the settling defendants.[17] Nonsettling defendants as a whole will then be required to pay the percentage of the total amount for which they are responsible. The nonsettling defendants will be jointly and severally liable for that percentage, and will continue to have rights of contribution against one another.

This approach satisfies the statutory goal of punishing each wrongdoer. Patently collusive or inadequate settlements are prohibited by Rule 23. To the extent that plaintiffs manage their own litigation, they could easily withdraw their complaint or settle with all defendants: there is no requirement in the statute that defendants pay a given amount of money.[18] *See Herzfeld v. Laventhol, Krekstein, Horwath & Horwath*, 540 F.2d 27, 30 (2d Cir.1976) (requiring each defendant to pay a pro rata sum regardless of relative culpability).

The goal of equity is also satisfied. Settling defendants pay an amount to which they voluntarily agree. The bar on further contribution extinguishes further risk on their

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[17]Borrowing the formula used in note 15, the jury will be required to find $T = S + (N1 + N2 + N3\ldots)$ where S and N equal the parties' relative culpabilities.

[18]Those who argue that there is a fourth goal — making the plaintiffs whole — that is not met ignore the fact that the plaintiffs voluntarily settled. There are many reasons why plaintiffs would be wise to do so. *See supra* note 16. *But see* Fiss, *Against Settlement,* 93 Yale L.J. 1073 (1984).

part. Nonsettling defendants never pay more than they would if all parties had gone to trial. This comports with the equitable purpose of contribution. *See Smith*, 827 F.2d at 561. Furthermore, this approach leaves the burdens of proof intact, alleviating Prudential-Bache's complaint that a good faith hearing under section 877.6 forces the burden of proof onto the nonsettling defendants. Obviously, there will be a certain amount of "finger-pointing" at the "empty chair." *See Sunrise Securities*, 698 F.Supp. at 1260. However, settling defendants will be protected by the bar order, and the financial motives of both plaintiffs and nonsettling defendants to vigorously press their arguments at trial will be unchanged.

Finally, this approach satisfies the policy goal of encouraging settlements. Defendants that are inclined to settle may do so without penalty or risk.

The Second Circuit argues that the approach we adopt may violate the one satisfaction rule. *Singer*, 878 F.2d at 600. We do not agree.

The one satisfaction rule provides that a plaintiff is only entitled to one satisfaction for any given injury. The Second Circuit paints this scenario: plaintiffs settle with some defendants for a large sum, at trial the nonsettling defendants are found to be primarily responsible for the damage and are required to pay a large sum, and plaintiffs end up with more money than they would have received if all parties had gone to trial. This, argues the Second Circuit, violates the one satisfaction rule.

In the first place, we do not believe that the plaintiffs in the above scenario have received more that one satisfaction for the same injury. All of the defendants are required to contribute, none pay the entire damages. The plaintiffs are merely receiving more money than they

might have in different circumstances. If all of the defendants had settled for a sum larger than the trial verdict, the one satisfaction rule would not be violated. There is little conceptual difference between that and only some of the defendants settling for a larger amount.

In the second place, it is not entirely clear that the one satisfaction rule applies in these circumstances. The rule is based in common law; it is not statutorily mandated. *U.S. Industries,* 854 F.2d at 1236. Contribution, on the other hand, is a statutory deviation from the common law. *Texas Industries, Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630, 634, 101 S.Ct. 2061, 2063, 68 L.Ed.2d 500 (1981). We are not convinced that the efficient and equitable administration of this statutorily mandated right must yield to the logic of a general rule.

V

Having decided upon the proper approach for partial pretrial settlements and bar orders, we must now determine whether the order issued by the district court in this case was proper.

The district court held a Rule 23 hearing fashioned on the requirements of California Code of Civil Procedure § 877.6. Many courts have commented on the similarity between a Rule 23 hearing and hearing pursuant to section 877.6. *E.g., In re United Energy Corp. Solar Power Modules Tax Shelter Investment Securities Litigation,* Fed.Sec.L.Rep. (CCH) ¶ 94,376, at 92,466 (C.D.Cal. 1989); *Kirkorian v. Borelli,* 695 F.Supp. 446, 454 (N.D.Cal.1988). To that extent, the district court did not err.

The district court issued a bar order. As discussed above, that is resonant with the purposes of the securities laws.

The district court's order, however, fell short of the requirements we have discussed above. Although the district court's order limited nonsettling defendants' ability to seek further contribution from the settling defendants, it did not limit the subsequent exposure of the nonsettling defendants. The limit must be the nonsettling defendants' actual percentage of liability for the amount of total damages determined at trial.[19] Therefore, we remand the order to the district court so that, subject to the agreement of the settling parties, it may refashion its order as we have instructed.

VI

Finally, Prudential-Bache argues that it is protected by certain contractual indemnity clauses. We have previously held that such clauses are invalid because they are against the policy of section 77k(f). *Stewart v. American Int'l Oil & Gas Co.,* 845 F.2d 196, 200 (9th Cir.1988). The district court was correct in holding these clauses invalid.

VII

The principles of compensation and contribution are in tension with the goals of full disclosure and settlement in actions under the securities laws. We believe that the most efficacious and equitable method of resolving this tension is by adopting a rule allowing only proportional

[19]Additionally, prevailing parties will be entitled to attorney's fees. Nonsettling defendants will not be liable for costs or fees solely attributable to legal services rendered by attorneys for plaintiffs or settling defendants in effecting a partial settlement.

liability if a contribution bar is entered as part of a pretrial partial settlement. In the absence of any guidance from Congress, such a rule becomes part of the federal common law.

The parties will bear their own costs on this appeal.

AFFIRMED in part, REMANDED in part.

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APPENDIX B

Master File No. 84-2091 N(M)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

In re KAYPRO CORPORATION
SHAREHOLDER LITIGATION

This Document Relates To:
ALL ACTIONS

FINAL JUDGMENT AND ORDER OF DISMISSAL

FILED February 1, 1988

This matter having come before the Court on the application of the parties for approval of the settlement set forth in the Stipulation of Settlement ("Stipulation") of the above-captioned Class Action, filed on September 3, 1987, and the Court having considered all papers filed and proceedings had herein and otherwise being fully informed in the premises and the Court having made findings of fact and conclusions of law accompanying this Judgment which constitute a final adjudication of this matter on the merits, and good cause appearing therefore, it is this 8th day of December, 1987

ORDERED, ADJUDGED AND DECREED THAT:

1. This Court has jurisdiction over the subject matter of this litigation, and all actions within this litigation and over all parties to this litigation, including all members of the Settlement Class.

2. This Court hereby approves the settlement set forth in the Stipulation and finds that said settlement is, in all

respects, fair, reasonable and adequate to the Settlement Class. The Settlement Class consists of:

> All persons who purchased or otherwise acquired the stock of Kaypro Corporation between August 25, 1983, and December 13, 1984. Excluded from the Settlement Class are the defendants herein, members of the immediate family of each of the individual defendants, any entity in which any defendant has a controlling interest, and the legal representatives, heirs, successors or assigns of any excluded party.

3. This Court hereby dismisses on the merits and with prejudice each and every Settled Claim (as defined below), of each and every Settlement Class Member (as defined in ¶ IX.A.(3) of the Stipulation) against each and all of the Settling Defendants (as defined in ¶ IX.A.(6) of the Stipulation) and the Insurers only, including, without limitation (but excluding the Non-Settling Defendants), their respective predecessors and successors, parents, subsidiaries and affiliates, and all their present and former partners, principals, officers, directors, reinsurers, employees, agents, attorneys, assigns, representatives, heirs, executors and administrators arising out of or based upon the Settled Claims and any and all claims against the Insurers under California Insurance Code, Section 790.03(h), and without costs to any of the settling parties as against the other.

4. All Settlement Class Members are hereby forever barred and enjoined from prosecuting the Settled Claims, as defined in the Stipulation, either directly or indirectly, against any or all of the Settling Defendants and the Insurers, including, without limitation (but excluding the Non-Settling Defendants), and their respective predecessors and successors, parents, subsidiaries and affiliates, and all of their present and former partners, principals,

officers, directors, reinsurers, employees, agents, attorneys, assigns, representatives, heirs, executors and administrators, including: (a) any and all claims, actions, causes of action, rights or liabilities, including Unknown Claims (as defined in the Stipulation), which exist or may in the future exist against any of the Settling Defendants by reason of any matter, cause or thing whatsoever arising out of, relating to, or in any way connected with the purchase or sale of other disposition or acquisition during the Settlement Class Period of any Kaypro common stock by a Settlement Class Member; (b) any and all claims, actions, causes of action, rights or liabilities, including Unknown Claims, which a Settlement Class Member has or may in the future have against any of the Settling Defendants by reason of any acts, omissions, or failure to act of any of the Settling Defendants during the Settlement Class Period in (but only in) their capacities as officers, directors, employees, agents and/or advisors of Kaypro; and (c) any and all claims, actions, causes of action, rights or liabilities, including Unknown Claims, which a Settlement Class Member has or may in the future have against any of the Settling Defendants arising out of or in any way connected with or related to any of the facts, circumstances, transactions, events, occurrences, acts or omissions or failures to act, of whatever kind or character whatsoever, irrespective of the state of mind of the actor performing, or omitting to perform the same, that are or could have been alleged, referred to, alluded to, or reflected in the Class Action.

5. The Class Action is dismissed with prejudice against the Representative Plaintiffs and the Settlement Class Members and in favor of the Settling Defendants without costs to any party as against the other.

6. Each and all of the Settling Defendants, and their respective predecessors and successors, subsidiaries and affiliates, and all of their present and former partners, principals, officers, directors, insurers, employees, agents, attorneys, assigns, representatives, heirs, executors and administrators are hereby and forever released and discharged with respect to any and all rights, claims, and causes of action the Settlement Class Members have, had or may have, known or unknown, arising out of, based upon or otherwise related to any of the Settled Claims, as defined in ¶ 5 above.

7. Neither the entry into the Stipulation nor the consent to this Judgment is, may be construed as, or may be used as an admission by or against any one or all of the Settling Defendants of any fault, wrongdoing, or liability whatsoever. To the extent permitted by law and the jurisdiction of this Court, the Stipulation, the settlement, this Judgment and any documents related to any of the foregoing shall not be offered or received in evidence in any civil, criminal, or administrative action or proceeding against or concerning the Settling Defendants other than such actions or proceedings as may be necessary or consummate or enforce the Stipulation and the settlement.

8. The notice given to the Settlement Class of the settlement set forth in the Stipulation and the other matters set forth therein was the best notice practicable under the circumstances, including the individual notice to all members of the Settlement Class who could be identified through reasonable effort. Said notice provided due and adequate notice of those proceedings and of the matters set forth therein, including the proposed settlement set forth in the Stipulation, to all persons entitled to such notice, and said notice fully satisfied the require-

ments of Rule 23(c)(2) and 23(e) of the Federal Rules of Civil Procedure and the requirements of due process.

9. The entry of this Judgment shall not affect the right of any of the Settling Plaintiffs (as defined in the Stipulation) from proceeding against the Non-Settling Defendant (as defined in the Stipulation).

10. Without affecting the finality of this Judgment in any way, this Court hereby retains continuing jurisdiction (a) over implementation of this settlement and any award or distribution of settlement proceeds to Settlement Class Members pursuant to further orders of this Court; (b) over disposition of the Settlement Fund; (c) over hearing and determining applications for attorneys' fees, costs, interest and expenses (including fees and costs of experts and/or consultants) in the Class Action; and (d) over all parties hereto for the purpose of enforcing and administering the Stipulation and Exhibits thereto.

11. In the event that the settlement does not become effective in accordance with the terms of the Stipulation, then this Judgment shall be rendered null and void and be vacated and the Stipulation and all orders entered in connection therewith shall be rendered null and void.

12. There being no just reason to delay the entry of this judgment, the clerk is ordered to enter this judgment forthwith.

Dated: December 8, 1987

/s/

The Honorable Harry R. McCue
United States Magistrate

So ordered February 1, 1988

/s/

Leland Nielsen, U.S. Dist. Judge

APPENDIX C

Master File No. 84-2091 N(M)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

In re KAYPRO CORPORATION
SHAREHOLDER LITIGATION

This Document Relates To:
ALL ACTIONS

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER AND JUDGMENT THAT SETTLEMENT IS ENTERED INTO IN GOOD FAITH

FILED February 1, 1988

On October 19, 1987, the motion of the Settling Plaintiffs and the Settling Defendants, as defined in the Stipulation of Settlement filed on September 3, 1987 (the "Stipulation"), came on regularly for hearing (the "Good Faith Hearing"). The findings of fact and conclusions of law herein are based, *inter alia,* on the following matters:

1. The Court's review of the Stipulation, the briefs and other written submissions made by each of the parties in connection with said motion.

2. The Court's consideration of the oral arguments of counsel for each of the parties at the Good Faith Hearing, including counsel's responses to inquiries by the Court regarding the settlement.

3. The Court's review of the Declaration of Keith F. Park ("Park Declaration"), dated February 15, 1987 and the Exhibits A-O attached thereto, including in particular the Kaypro Prospectus, dated August 25, 1983, the

Kaypro Annual Report for 1983, the Kaypro 10K filed November 23, 1983, the Kaypro 10Q filed January 13, 1984, April 16, 1984 and July 16, 1984, respectively.

4. The Court's review and analysis of the Summary of Damage Calculations submitted with the Park Declaration, and the arguments of the defendants regarding various factors which they contend would considerably reduce the amount of damages set forth in the Summary of Damage Calculations.

5. The Court's review and analysis of the applicable policies of insurance held by, and on behalf of the Settling Defendants, submitted in connection with the Good Faith Motion by defendant Prudential-Bache Securities, Inc.

6. The Court's participation in several settlement conferences with the parties, including conferences with the non-settling defendants. Among the issues discussed in these conferences were questions of contribution and indemnity among the defendants, both from a legal and factual perspective.

7. The Court's review of all settlement conference memoranda submitted, including the Plaintiffs' Settlement Conference Statement, filed December 18, 1986.

8. The Court's analysis of the Consolidated Amended Complaint, the answers of the Defendants, the Cross-Complaint of Prudential-Bache Securities, Inc. and the state court complaint filed by Prudential-Bache Securities, Inc.

Based on the Court's review and analysis of these matters and, good cause appearing therefor, the Court

hereby makes the following FINDINGS OF FACT AND CONCLUSIONS OF LAW:

A. The overall amount of the Settlement Fund, as defined in the Stipulation, is within the reasonable range of the Settling Defendants' proportional share of liability for the Settling Plaintiffs' alleged injuries and reflects the proper and fair share of the Settling Plaintiffs' alleged damages, with due recognition being given to the risks of continued litigation against the Settling Defendants, the difficulties associated with satisfaction of any judgment against the Settling Defendants, the risk of dissipation or loss of assets of the Settling Defendants, including any applicable insurance coverage, and the fact that the Settling Defendants should pay less in settlement than if they were found liable after trial.

B. The court has considered the financial condition of the Settling Defendants in relation to their potential liability to the Settling Plaintiffs and the amount of insurance potentially available to cover the acts of the Settling Defendants and finds and concludes that the amount contributed on behalf of the Settling Defendants to the Settlement Fund, *i.e.,* Nine Million Two Hundred Fifty Thousand Dollars ($9,250,000.00) is substantial, fair and reasonable, particularly in light of the availability of coverage, the risk of imposing liability against certain of the Settling Defendants, and the difficulty associated with the satisfaction of any judgment that might be rendered against those of the Settling Defendants who are individuals.

C. There is no evidence of collusion, fraud or tortious conduct in entering into the Stipulation by any of the parties to the Stipulation aimed at causing injury to the interests of the Non-Settling Defendant.

Based on the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED AS FOLLOWS:

1. The Settlement embodied in the Stipulation is entered into and made in good faith, within the meaning of §§ 877 and 877.6 of the California Code of Civil Procedure and for all other purposes.

2. All claims for contribution, indemnification, or reimbursement, however denominated, against the Settling Defendants arising under the federal securities laws or state law, including those based in tort, contract, or statute, or any other body of law, in favor of persons, including Non-Settling Defendants, who are asserted to be or who may be joint tort-feasors or wrongdoers, however denominated, with the Settling Defendants in the Settled Claims and based upon the Settled Claims, are extinguished, discharged, satisfied and/or otherwise unenforceable.

3. Any findings of fact herein made shall also be deemed a conclusion of law, and any conclusion of law herein made shall also be deemed a finding of fact.

4. There being no just reason to delay the entry of this judgment, the clerk is ordered to enter this judgment forthwith.

Entry of this Order is recommended.

Dated: December 8, 1987

/s/

The Honorable Harry R. McCue
United States Magistrate

IT IS SO ORDERED this 1st day of February, 1988.

/s/

The Honorable Leland C. Nielsen
United States District Judge

APPENDIX D

William S. Lerach
Keith F. Park
Blake M. Harper
Milberg Weiss Bershad
Specthrie & Lerach
2000 Central Savings Tower
225 Broadway
San Diego, California 92101
Telephone: (619) 231-1058

Robert A. Skirnick
Michael P. Fuchs
Patricia I. Avery
Wolf Popper Ross Wolf & Jones
845 Third Avenue
New York, New York 10022
Telephone: (212) 759-4600

Co-Lead Counsel for Plaintiffs

Master File No. 84-2091 N(M)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

In re Kaypro Corporation
Shareholder Litigation

This Document Relates To: ALL ACTIONS

STIPULATION OF SETTLEMENT

This Stipulation of Settlement (the "Stipulation"), dated as of June 12, 1987, is made and entered into by and among the Settling Plaintiffs, the Settling Defendants, and the Insurers, as those terms are defined herein, by and through their attorneys or their counsel of record in the actions described in Paragraph I herein.

I.

DESCRIPTION OF THE CLASS ACTIONS

On and after September 14, 1984, the following actions were filed in the United States District Court for the Southern District of California (the "Court") as class actions on behalf of all persons, except defendants, who purchased, or otherwise acquired the common stock of Kaypro Corporation ("Kaypro") between August 25, 1983 and July 17, 1984, inclusive:

Franklin v. Kaypro Corporation, et al., No. 84-2091-B(I);

Weinberger v. Kaypro Corporation, et al., No. 84-2238-T(I);

Reznic v. Kaypro Corporation, et al., No. 84-2239-K(CM);

Quint v. Kaypro Corporation, et al., No. 84-2240B(IG);

Holmes v. Kaypro Corporation, et al., No. 84-2308-GT(M);

Love v. Kaypro Corporation, et al., No. 84-2309-JLI(I)

All of the above actions (collectively referred to herein as the "Class Action") assert violations of the federal securities laws and state laws against, *inter alia,* certain of the Settling Defendants.

II.

CONSOLIDATION OF THE CLASS ACTIONS

On December 17, 1984, the Court entered Pretrial Order No. 1, which consolidated the Class Action under the caption *In re Kaypro Corporation Shareholder Litigation* and designated Milberg Weiss Bershad Specthrie & Lerach and Wolf Popper Ross Wolf & Jones, as co-lead counsel for purposes of prosecuting the Class Action and all related actions subsequently transferred to the Court. A Consolidated Amended Complaint was filed on December 19, 1984.

III.

CLASS ACTION CERTIFICATION AND NOTIFICATION PROCEEDINGS

A. Initial Class Action Determination

On May 2, 1985, the Court certified, pursuant to Rule 23 of the Federal Rules of Civil Procedure, a plaintiff class in the Class Action defined as follows:

1) For purposes of adjudicating the claims for violation of Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)), Sections 11, 12(2) and 17(a) of the Securities Act of 1933 (15 U.S.C. §§ 77k, 77*l*(2), and 77(q), and to adjudicate plaintiffs' common law claims for fraud and negligent misrepresentation:

> All persons, except defendants, who purchased or otherwise acquired the common stock of Kaypro Corporation between August 25, 1983 and July 17, 1984.

2) For purposes of adjudicating the claims under Sections 25400 and 25401 of the California Corporations Code:

> [T]hat portion of the plaintiff shareholder class which purchased or otherwise acquired the common stock of Kaypro Corporation either on the offering of August 25, 1983 or in California in the open market between August 25, 1983 and July 17, 1984.

In certifying this class (the "Certified Class"), the Court designated the named plaintiffs in the Class Action, *i.e.*, George Franklin, Jon and Ellen Quint, Stefan Reznic, William B. Weinberger, Richard Love, and Paul L. and Evelyn S. Holmes, as representatives of the class.

The named plaintiffs in the Class Action are collectively referred to herein as the "Class Representatives."

B. Settlement Class Description

For purposes of the Settlement embodied in this Stipulation, the parties agree that the certified class shall be expanded and defined as follows (the "Settlement Class"):

> All persons who purchased or otherwise acquired the stock of Kaypro Corporation between August 25, 1983, and December 13, 1984. Excluded from the Settlement Class are the defendants herein, members of the immediate family of each of the individual defendants, any entity in which any defendant has a controlling interest, and the legal representatives, heirs, successors or assigns of any excluded party.

IV.

DISCOVERY IN THE CLASS ACTION

Counsel for the Settling Plaintiffs have been accorded and have conducted extensive discovery during the prosecution of the Class Action. The discovery had included, *inter alia*, numerous inspections of documents and informal investigations and consultation with experts. Counsel for the Settling Plaintiffs have also researched the applicable law with respect to the claims of the Settling Plaintiffs against the Settling Defendants and the potential defenses thereto.

V.

CLAIMS OF THE SETTLING PLAINTIFFS

The Settling Plaintiffs have claimed and continue to claim that each and all of the contentions made by them in the Class Action have merit. Notwithstanding this Stipulation, the Settling Plaintiffs expressly assert that the claims alleged in the Class Action have merit and give rise to liability on the part of the Settling Defendants. Neither this Stipulation nor any document referenced herein, nor any action taken to carry out this Stipulation is, may be construed as, or may be used as an admission by or against the Settling Plaintiffs that any of their claims are without merit or that the maximum of recoverable damages hereunder does not exceed the amount of the Settlement Fund. Entering into or carrying out this Stipulation, the Exhibits hereto, and any negotiations or proceedings related thereto shall not in any event be construed as, or deemed to be evidence of, an omission or concession by any of the parties hereto or a waiver of any applicable statute of limitations and shall not be offered or received in evidence in any action or proceeding by any

party hereto in any court, administrative agency or other tribunal for any purpose whatsoever other than to enforce the provisions of this Stipulation, or the provisions of any related agreement or release, except that this Stipulation and the Exhibits hereto may be filed in the District Court as evidence thereof.

VI.

BENEFITS OF SETTLEMENT TO SETTLING PLAINTIFFS

Counsel for the Settling Plaintiffs recognize the expense and length of continued proceedings necessary to prosecute the Class Action against the Settling Defendants through trial and through appeals. Counsel for the Settling Plaintiffs also have taken into account the uncertain outcome and the risk of any litigation, especially in complex actions such as the Class Action, as well as the difficulties and delays inherent in such litigation. Each of the counsel for the Settling Plaintiffs has, therefore, determined that the settlement set forth in this Stipulation is in the best interests of the Settling Plaintiffs represented by such counsel.

VII.

SETTLING DEFENDANTS' DENIALS OF WRONGDOING AND LIABILITY

Settling Defendants have denied and continue to deny each and all of the claims and contentions alleged by plaintiffs in the Class Action. Settling Defendants have repeatedly asserted and continue to assert many defenses thereto, and have expressly denied and continue to deny any wrongdoing or legal liability arising out of the con-

duct alleged in the Class Action. Neither this Stipulation nor any document referred to herein nor any action taken to carry out this Stipulation, is, may be construed as, or may be used as an admission by or against the Settling Defendants of any fault, wrongdoing or liability whatsoever. There has been no determination by any Court as to the factual allegations made against the Settling Defendants. Entering into or carrying out this Stipulation, and Exhibits hereto, and any negotiations or proceedings related thereto shall not in any event be construed as, or deemed to be evidence of, an admission or concession of any of the parties hereto or a waiver of any applicable statute of limitations and shall not be offered or received in evidence in any action or proceeding against any party hereto in any court, administrative agency or other tribunal for any purpose whatsoever other than to enforce the provisions of this Stipulation, or the provisions of any related agreement or release, except that this Stipulation and the Exhibits hereto may be filed in the District Court as evidence thereof.

VIII.

BENEFITS OF SETTLING TO THE SETTLING DEFENDANTS AND THE INSURERS

Settling Defendants and the Insurers have concluded that it is desirable that the Class Action be settled in the manner and upon the terms and conditions set forth herein in order to avoid the expense, inconvenience and distraction of further legal proceedings and to put to rest the Settled Claims by the Settling Plaintiffs against the Settling Defendants.

excess of the Settlement Amount with respect to the Settled Claims or claims for contribution, indemnification, or reimbursement, however denominated, against the Settling Defendants arising under the federal securities laws or state law, including those based in tort, contract or statute, or any other body of law, in favor of persons, including the Non-Settling Defendants who are asserted to be or who may be joint tort-feasors [sic] or wrongdoers, however denominated, with the Settling Defendants in the Settled Claims and based upon or arising from the Settled Claims, *i.e., any judgment entered against any Non-Settling Defendant would be reduced by the amount of the Settlement between Settling Plaintiffs and Settling Defendants or by the amount of the Settling Defendants' share of the damages, whichever is greater.* (E.R. 421-422) (emphasis added).

Therefore, petitioners contracted for the result ultimately fashioned by the appellate court.[1] Their stipulation of settlement constituted an agreement to accept this settlement and to convert it to a proportionate liability judgment reduction settlement in the event of a successful appeal. The terms of petitioners' stipulated settlement demonstrate the falsity of petitioners' assertion that "for example, in the case below, if the Ninth Circuit's rule had been known from the outset, plaintiffs would not have

[1]The appellate court did not fashion a rule of law which allows non-settling defendants to receive the *greater* of (1) a judgment credit (i.e., $925,000,000) *or* (2) a judgment reduction (i.e., percentage of fault reduction); rather than the appellate court held that the non-settling defendants were entitled to a judgment reduction *instead of* a judgment credit. However, the court ordered that the matter be remanded "to the district court so that, subject to the agreement of the settling parties, it may refashion its order as we have instructed." (Appendix A, p.23a)

settled with Kaypro and its eight officers and directors, forcing a jury trial of all eleven defendants upon an already busy district court." (Petition, p. 22, first full paragraph.)

The appellate court's opinion therefore establishes as a rule of offset the contractual alternative agreed to in the stipulation of settlement. This relief is precisely the relief requested by Prudential-Bache (assuming its challenge to the good faith nature of the settlement was rejected). (See Prudential-Bache Opening Brief, 30:19-35:16; Prudential-Bache Reply Brief, 8:17-12:4.) Petitioners' assertion that the amount of the offset to which Prudential-Bache would be entitled at trial was "hardly addressed by the briefs" is flatly wrong.

The appellate court's opinion affirms the good faith bar, by assuring settling defendants that they have "bought their peace." That finding is constant in both the district court and appellate court's opinions. The appellate court's opinion further provides that, following a settlement, non-settling parties such as Prudential-Bache will be entitled to a credit based upon the settling defendants' proportionate liability, rather than an arbitrary amount paid in settlement.

The approach adopted by the appellate court encourages responsible settlement while accommodating the goals of the federal securities laws, including fostering appropriate damage recoveries, deterring wrongful conduct and allocating liability in accordance with relative culpability. Accordingly, for the reasons set forth below, the petition for *certiorari* should be denied in its entirety.

III.

SUMMARY OF ARGUMENT

The arguments set forth below can be summarized as follows:

(1) The appellate court's holding should not be disturbed for the following reasons:

(a) The proportionate liability judgment reduction rule adopted by the appellate court will encourage global and responsible partial settlements;

(b) The appellate court's holding recognizes that elimination of non-settling defendants' rights to contribution and indemnification against settling-defendants is appropriate only if the potential for joint and several liability is modified by proportionate liability judgment reduction; and

(c) The appellate court's holding appropriately seeks to accommodate all of the competing concerns of the federal securities laws.

(2) Insofar as the petition seeks *certiorari* to review the question of implied liability under the 1934 Act, it should be denied on the following grounds:

(a) Petitioners failed to raise the issue before the trial court, and are therefore precluded from raising the issue at this point;

(b) An implied right to contribution under the 1934 Act is necessary to protect the statutory contribution scheme under the 1933 Act and the policies of the federal securities laws in general; and

(c) An implied right to contribution under section 10(b) is a necessary corollary to a finding of joint and several liability under the 1934 Act.

(3) Judgment reduction credit is required under the 1934 Act for reasons identical to those set forth above relating to the 1933 Act.

IV.

ARGUMENT

A. The Appellate Court's Judgment Credit Formulation Should Not Be Disturbed.

(1) The Judgment Reduction Rule Established by the Appellate Court Is the Only Rule Which Will Encourage Global and Responsible Partial Settlements.

The appellate court's holding balances the various competing policy concerns under the federal securities laws and will encourage responsible and equitable settlements. Petitioners, emphasizing only the goal of full recovery, argue that the holding will discourage settlement because plaintiffs may have to bear the risk of an inadequate settlement under certain circumstances. This is simply unfounded.

Settlements are favored because they represent economical and efficient resolutions of disputes. Global settlements of all claims by and against all parties to a litigation are desirable because they represent complete resolutions of disputes. Global settlements will be discouraged by rules of liability allocation that enable certain defendants (either with or without collusion with the plaintiff) to avoid their fair share of responsibility or to shift that responsibility unfairly on to others.

Under the appellate court's holding, global settlements will be encouraged. Plaintiffs will be reluctant to settle with primarily culpable defendants for inappropriately low amounts because such settlements will adversely affect their potential total recovery. Culpable defendants will be less inclined to hold out for trial when it is clear that they cannot use less culpable defendants' settlements as shields. Plaintiffs and less culpable defendants will be encouraged to settle with one another on appropriate terms because such defendants will be able to obtain peace at a fair price, and plaintiffs will not be concerned that by settling they are prejudicing their recovery against more culpable defendants.

In view of the relative risks and advantages to all parties, a global settlement fairly allocating the parties' assessment of comparative fault will be the logical outcome in most instances under the appellate court's approach.

Where a global settlement does not result, partial settlements will be based more appropriately on the relative culpability of each party. A plaintiff will be less inclined to work out a "sweet heart" deal with the principal malefactor in order to be able to proceed against less culpable but perhaps "deeper pocketed" defendants. A culpable defendant which holds out through trial will be assessed damages based on its relative responsibility rather than on the happenstance of who settled prior to trial and for how much.

The instant case, itself, is evidence that the proportionate liability approach does not discourage settlements. Petitioners settled with Kaypro and its officers and directors recognizing that any recovery against non-settling defendants could be limited by principles of relative fault.

Thus, to the extent the holding below affects partial settlements, the opinion encourages responsible settlements. Where a plaintiff chooses unilaterally to engage in partial settlements in successive stages, that plaintiff is encouraged to settle wisely, because it is plaintiff who will bear the risk of an unwise settlement. This result is neither improper nor unfair because it is plaintiffs (along with settling defendants) rather than non-settling defendants who choose to settle or not to settle. It is inappropriate to place the risk of an unfairly low settlement upon a non-participating non-settling defendant.[2]

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[2]In this regard, the appellate court's rejection of the Second Circuit's position in *Singer v. Olympia Brewing Co.*, 878 F.2d 596 (2d Cir. 1989), is certainly not a ground, in and of itself, to grant this petition. The *Singer* court's opinion fails to consider the various competing concerns addressed by the appellate court below, a fact perhaps recognized by this Court in its denial of the petition for *certiorari* in *Singer*. In addition, the *Singer* opinion did not involve the extinguishment of contribution rights, a request for allocation based upon relative fault or even the issue of a settlement bar between defendants in the same action. The *Singer* court was *only* concerned with whether the settlement should be deducted from the judgment or from the amount of the settling defendant's potential liability.

This very concern was ably addressed by the district court of Colorado in a recently decided securities case closely analogous to the facts of this case. *Alvarado Partners, Lt. v. Mehta,* 723 F. Supp. 540 (D. Colo. 1989). In adopting a "proportionate rule" [similar to the holding of the appellate court here] rather than a "*pro tanto*" rule [similar to the judgment credit rule sought by petitioners], the trial court emphasized the control that the settling plaintiff enjoyed over the entire process, noting the following:

> On the other hand, application of the proportionate rule allows the traditional burdens of litigation to remain where they belong — with plaintiff. If plaintiff wants a "war chest" to fund the litigation through settlement with some of the defendants, plaintiff should bear the risk of an inadequate settlement. *In re Sunrise, supra.* Also while under this rule plaintiff bears the risk of an unfair or unwise settlement, plaintiff has an incentive to obtain a shrewd and informed settlement. If settling defendants pay an amount greater than their proportionate fault as later determined at trial, plaintiff benefits because it retains the entire prior settlement. (723 F. Supp. at 553.)

There is even evidence that the judgment credit rule favored by petitioners actually encourages inequitable or "bad settlements." As the court noted in *In re Sunrise Securities Litigation,* 698 F. Supp. 1256 (E.D. Pa. 1988), because the *pro tanto* or judgment credit rule places the risk of a bad settlement on the non-settling defendants, it "provides an incentive for attempts by guiltier defendants to get off cheaply by settling first." 698 F. Supp. at 1259. As the court noted:

> Because their ultimate monetary recovery would be unaffected, plaintiffs have no incentive to insure that a settlement approximates the defendants' share of liability. Indeed, it is arguable that the only settlements the *pro tanto* rule would promote would be bad settlements, i.e., those in which settling defendants pay less than their share of liability. (698 F. Supp. at 1259.)

These policies were recognized by the appellate court below which flatly rejected a judgment credit rule in concluding:

> There are several disadvantages to this scheme. Plaintiffs may be tempted to engage in collusion with certain defendants. By accepting a low partial settlement, plaintiffs would be able to fund further litigation with no diminution of the total amount eventually received. Similarly, plaintiffs could effect low settlements with the defendants who had limited resources, and thereby force wealthier defendants to pay more than if all parties proceeded to trial. *In re Kaypro Corporation Securities Litigation*, Appendix A, pps. 17a-18a.

By emphasizing the goal of full recovery to the exclusion of all other competing considerations under the federal securities laws, petitioners seek to have this Court establish a national rule of law which would cause non-settling defendants such as Prudential-Bache (which, in the first three drafts of this settlement, was to be dismissed without paying as much as one dollar) to be liable to these petitioners for some $15,750,000 at trial, solely by virtue of Prudential-Bache's status as an ongoing business concern (i.e., deep pocket).

(2) The Appellate Court Holding Recognizes That Elimination Of Non-Settling Defendants' Rights To Contribution And Indemnification Against Settling Defendants Is Appropriate Only If The Potential For Joint And Several Liability Is Modified By Proportionate Liability Judgment Reduction.

Petitioners repeatedly argue that the holding below must be reversed because it "undermines joint and several liability" under the federal securities laws. The first clause of section 11(f) of the 1933 Act is referenced repeatedly, followed by the same conclusion, namely, that the appellate court's holding must be reversed because it seeks to undermine a federal statute.

Petitioners' argument overlooks the remainder of the recovery scheme under the 1933 Act as well as the final portion of section 11(f). Section 11(f) expressly provides a right of contribution for any person who is to be jointly and severally liable under that section. Petitioners fail to acknowledge that the settlement bar which is the result of their good faith settlement extinguishes all rights to contribution and equally affects the statutory scheme under section 11(f). The modification of the statutory recovery scheme begins with the good faith bar; the judgment reduction analysis by the appellate court below merely attempts to balance the impact created by that bar.

In the absence of settlement, traditional principles of joint and several liability remain undisturbed. Similarly, as noted previously, following the appellate court's holding, joint and several liability remains as to non-settling defendants. The concept of joint and several liability need only be adjusted where petitioners seek to extinguish contribution rights as a result of the good faith bar.

The underwriting agreement entered into by Kaypro and Prudential-Bache as lead underwriter for the Kaypro common stock offering provided, *inter alia*, that the underwriters were entitled to indemnification and/or contribution from Kaypro with respect to certain liabilities and expenses. The district court's good faith settlement bar abrogated those contractual rights. Section 11(f) of the 1933 Act and common law principles also provided Prudential-Bache with contribution rights against Kaypro and its officers and directors, which the district court's settlement bar order also eliminated.

Contribution is an equitable principle developed to mitigate the harsh result of joint and several liability. Note: *Apportioning Contribution Shares Under the Federal Securities Laws Acts: A Suggested Approach for an Unsettled Area,* 50 Fordham L. Rev. 450, 456 (1981). Where contribution rights are extinguished by the good faith bar, the appellate court's holding acknowledges the need to provide non-settling defendants with certain protection. In that regard, the only limitation that the holding provides is that if plaintiffs choose to enter into a partial settlement, thereby extinguishing non-settling defendants' contribution rights, plaintiffs must incur a portion of the risk traditionally associated with that settlement by giving up part of the advantage of joint and several liability.

Clearly petitioners would prefer to settle with certain defendants and then receive the balance of all potential damages from non-settling defendants, regardless of non-settling defendants' comparative liability. Petitioners have failed to identify a policy, however, under the federal securities laws or otherwise, which supports their position. In adopting a proportionate liability judgment reduction rule, the appellate court holding seeks to balance

the interests of all parties, and to encourage equitable settlements while continuing to observe traditional legal principles of joint and several liability.

The appropriateness of the appellate court's holding can be illustrated by the following hypothetical. Assume total liability in a case of $25 million, settlement by two defendants prior to trial for a total of $10 million with a good faith bar order entered, and a trial between plaintiffs and the two remaining defendants which results in a finding of liability as to both defendants. Under petitioners' theory, the two non-settling defendants would be jointly and severally liable for $15 million ($25 million minus $10 million) irrespective of the relative fault of the defendants. Even if the two settling defendants were each found by the trier of fact to be 40% responsible and the two non-settling defendants were each found to be 10% responsible, either non-settling defendant could still be required to pay $15 million (60% of the damages) with no right to contribution from either of the settling defendants, each of which the trier of fact found to be 40% responsible. Thus, a defendant with comparatively little fault (10%) could be assessed 60% of the damage award solely because the plaintiff chose to settle with the principal wrongdoers for far less than their true responsibility.

By comparison, under the appellate court's holding, the two non-settling defendants would be jointly and severally liable for $5 million (20%) with rights of contribution between the two of them appropriately preserved.

Once plaintiffs choose to settle, their ability to recover the entire judgment is limited to the extent plaintiffs mistakenly assess the settling defendants' liability when entering into a partial settlement. Accordingly, the only limitation which the appellate court's holding places on the exercise of joint and several liability is an equitable

one triggered by plaintiffs' voluntary decision to enter into a partial settlement. Plaintiffs should not be allowed to escape responsibility for their own settlement decisions at non-settling defendants' expense.

(3) The Appellate Court Holding Appropriately Seeks to Accommodate All of the Competing Concerns of the Federal Securities Laws.

The petition focuses upon one goal — full recovery by plaintiffs. To support that goal, the petition relies predominantly upon that portion of section 11(f) which provides for joint and several liability. As this Court is aware, however, there are a number of competing concerns which must be reconciled in addressing the issues raised by a settlement bar order.

The appellate court's holding addressed these various competing concerns. They include not only the goal of maximum recovery emphasized by petitioners, but also (1) the statutory goal of punishing each wrongdoer; (2) the equitable goal of limiting liability to relative culpability (*Smith v. Mulvaney, supra*); (3) the statutory right to contribution; (4) equitable concerns of fairness; and (5) the encouragement of settlement, particularly global and/or responsible partial settlements.

Whereas the appellate court's opinion contains an analysis of these factors, the petition does not. The petition argues that notwithstanding these competing concerns, a plaintiff in complete control of the settlement process should not be required to accept any risk associated with an inadequate partial settlement, even where that plaintiff concedes that the initial partial settlement had the effect of requiring non-settling parties to pay well in excess of their relative culpability as established at trial. Such an approach is neither supported by statute nor existing case

law, and forms an inappropriate basis upon which to modify the opinion of the appellate court below.

B. Insofar As the Petition Seeks Certiorari to Review The Question of Implied Liability Under the 1934 Act, It Should Be Denied.

(1) Petitioners Failed to Raise this Issue Before The Trial Court, and Are Therefore Precluded From Raising it at This Time.

Ordinarily, this Court does not decide questions not raised or resolved in the lower court. *Youakim v. Miller,* 96 S.Ct. 1399, 426 U.S. 231, 47 L.Ed.2d 701, *on remand,* 431 F. Supp. 40, *affirmed,* 562 F.2d 483, *probable jurisdiction noted,* 98 S.Ct. 1230, 434 U.S. 1060, 55 L.Ed.2d 760, *affirmed,* 99 S.Ct. 957, 440 U.S. 125, 59 L.Ed.2d 194 (1976). In *Hoover v. Ronwin,* 466 U.S. 558, 80 L.Ed.2d 590, 104 S.Ct. 1989 (1984), this Court noted that "the failure to raise this issue in a timely manner precludes our consideration."[3]

A similar rule applies in the court of appeals. *U.S. v. Immordino,* 534 F.2d 1378 (10th Cir. 1976). An issue not raised in the district court will not generally be considered by the court of appeals.

In their brief filed with the Ninth Circuit, petitioners conceded that the question of an implied right to contribution under the 1934 Act was not raised before the district court. Specifically, their brief stated:

> The statutory bases for the remaining federal claims asserted in this action do not expressly provide for

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[3]In *Hoover,* Constitutional claims involving the fifth and fourteenth amendments were raised for the first time in Ronwin's response to petitioner's motion for rehearing in the court of appeals.

contribution among joint tortfeasors. [Footnote omitted.] An implied right to contribution, however, is generally recognized. *See Tucker v. Arthur Andersen & Co.*, 646 F.2d 721, 727 n.7 (2d Cir. 1981); *Heizer Corp. v. Ross*, 601 F.2d at 332; *In re Nucorp Energy Securities Litigation*, 661 F. Supp. 1403 (S.D. Cal. 1987); *In re National Student Marketing Litigation*, 517 F. Supp. 1345, 1347-48 (D.D.C. 1981). This court recognized the existence of an implied right of contribution under section 10(b) of the Exchange Act in *Smith v. Mulvaney*, 827 F.2d at 560.[15]

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[15]Plaintiffs assume the existence of implied rights of contribution under these statutes, particularly in light of the court's recent holding in *Smith*. ***The issue of whether an implied right exists was not presented to or described by the court below.*** It should be noted, however, that in holding that an implied right of contribution exists, the *Smith* court did not engage in the analysis relating to when rights may be implied that was required by the Ninth Circuit's *en banc* decision in *In re Washington Public Power System Securities Litigation*, 823 F.2d 1349 (9th Cir. 1987), holding that no private right of action may be implied under section 17(a) of the Securities Act. In that case, the court applied the analysis articulated by the Supreme Court in *Cort v. Ash*, 422 U.S. 66 (1975), to determine whether a private remedy is implicit where not expressly provided by statute. *In re Washington Public Power Supply System*, 823 F.2d at 1353. Such an analysis of congressional intent was engaged in neither by the *Smith* court nor by those circuit court decisions upon which *Smith* relied. *See Huddleston v. Herman & MacLean*, 640 F.2d 654, 667-68 (5th Cir. 1981), *aff'd in part and rev'd in part on other grounds*, 459 U.S. 375 (1983); *Heizer*, 601 F.2d at 331-34; *Globus, Inc. v. Law Research Service, Inc.*, 318 F. Supp. 955, 958 (S.D.N.Y. 1970), *aff'd per curium*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971). [Appellees' brief on appeal, p. 24-25. Emphasis added.]

In their petition for rehearing with suggestion for rehearing *en banc* filed with the Ninth Circuit, petitioners

included one paragraph pertaining to the implied right to contribution under section 10(b). (Petition for Rehearing, p. 14, last full paragraph.) With the exception of that paragraph, however, the entire petition for rehearing concerned the credit issue which is raised in the first and third grounds of their present petition.

In light of their failure to raise the issue before the district court and their failure to contest the issue before the Ninth Circuit, petitioners should now be precluded from raising the issue before this Court at this time. Their one paragraph inclusion in their petition for rehearing is an inappropriate method for raising the issue for the first time. *Hoover v. Ronwin, supra.*

(2) An Implied Right to Contribution Under Section 10(b) of the 1934 Act Is Necessary to Protect the Statutory Contribution Scheme Under the 1933 Act and the Policy of Deterrence Underlying the Federal Securities Laws.

As petitioners have noted, the Ninth Circuit, along with various other courts, has specifically held that a right to contribution is implied under section 10(b) of the 1934 Act. *Smith v. Mulvaney*, 827 F.2d 558 (9th Cir. 1987), *Globus v. Law Research Service Inc.*, 442 F.2d 1346 (2d Cir.) *cert. denied*, 404 U.S. 941 (1971). Such a finding is desirable for a variety of reasons.

The policy of deterrence under the federal securities laws is well documented. *Tucker v. Arthur Andersen & Co.*, 646 F.2d 721, 727 (2d Cir. 1981). One of the principal purposes of the federal securities laws is to deter culpable conduct. Only by implying a right to contribution under section 10(b) of the 1934 Act will the goal of deterrence be properly implemented, especially given the volume of litigation involving section 10(b).

The appropriateness of an implied right of contribution under section 10(b) of the 1934 Act is apparent from the complementary statutory framework under the 1933 Act. The express right to contribution guaranteed by section 11(f) of the 1933 Act could be abrogated if a similar right is not implied under section 10(b) of the 1934 Act. Whereas damages under the 1933 Act are to be equitably prorated under the statutory scheme of contribution, the intent of that statute could be thoroughly frustrated by the imposition of joint and several liability under section 10(b) without the implication of corresponding rights to contribution.

Such a result could not have been intended by Congress in enacting the 1934 Act. In cases such as this, where claims under both the 1933 and 1934 Acts are concurrently filed, the need for a correlative right to contribution under the 1934 Act is paramount, at least if joint and several liability under section 10(b) is assumed.

Such a conclusion is not affected by petitioners' citation to this Court's opinions in *Texas Industries v. Radcliffe Materials Inc.,* 451 U.S. 630 (1981) and/or *Northwest Airlines Inc. v. Transport Workers Union,* 451 U.S. 77 (1981), or other cases. Neither the Title VII legislation in the *Northwest Airlines* decision nor the Sherman and Clayton Acts in *Texas Industries* involve the same emphasis upon deterrence as is prevalent throughout the decisions interpreting the federal securities laws. This Court, in acknowledging that a number of federal courts have recognized an implied right to contribution under the federal securities laws in both *Northwest Airlines* and *Texas Industries*, chose not to overrule or distinguish those prior decisions, despite the opportunity to do so in both cases. (*See, Northwest Airlines v. Transport Workers*

Union, 451 U.S. at 91, fn. 24; *Texas Industries v. Radcliffe Materials Inc., supra,* 451 U.S. at 639, fn. 11.)

(3) An Implied Right to Contribution Under Section 10(b) Is a Necessary Corollary to a Finding of Joint and Several Liability Under the 1934 Act.

In their introduction to the statement of the case, petitioners assert, without further justification or citation, that liability under the "federal securities laws" (presumably including all sections of the 1934 Act) is joint and several, citing section 20 of the 1934 Act, 15 U.S.C. § 78(t)(a). While section 20 of the 1934 Act provides for control person liability in certain contexts, the application of joint and several liability under the 1934 Act in general or section 10(b) in particular has not been fully resolved.

The concepts of joint and several liability on the one hand and contribution on the other hand are correlative; if one is lacking, the other should be unavailable. To view these interrelated doctrines otherwise is conceptually inconsistent.

Thus, to the extent that a right of contribution, such as that recognized by the Ninth Circuit in *Smith v. Mulvaney, supra,* is implied under section 10(b), then liability under section 10(b) may be joint and several as well. Conversely, if contribution is unavailable (as urged by petitioners) then joint and several liability should be unavailable as well. It is the finding of joint and several liability which creates the need for contribution.

C. Judgment Reduction Is Proper Under Cases Brought Under the 1934 Act As Well.

The petition nominally presents three questions for review. The first challenges the appellate court's finding

of proportionate liability judgment reduction and by its terms is limited to section 11 of the 1933 Act. The second challenges the implied right to contribution under section 10(b). The remaining question simply analyzes the appellate court opinion with respect to its impact on claims under section 12(2) of the 1933 Act and section 10(b) of the 1934 Act.[4]

For all the reasons previously stated, the appellate court's holding should extend to all of petitioners' claims. All of the arguments described above apply with equal force to claims under the 1934 Act.

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[4]The appellate court's holding that a non-settling defendant is entitled to proportionate liability judgment reduction clearly extends to all of petitioners' federal securities claims. Although petitioners frequently assert that the appellate court's analysis was limited to the Section 11 claim, there is absolutely no language within the appellate opinion suggesting a different approach with regard to petitioners' other federal securities claims.

IV.

CONCLUSION

For all the reasons stated herein, the petition should be denied in its entirety.

DATE: August , 1990

Respectfully submitted,

KEESAL, YOUNG & LOGAN
STEPHEN YOUNG
ROBERT D. FEIGHNER
(Counsel of Record)
BEN R. SUTER

Catalina Landing
310 Golden Shore
Long Beach, California 90801-1730
Telephone: (213) 436-9051

No. 90-98 (5)

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1990

GEORGE FRANKLIN, *et al.*,
Petitioners,

vs.

PEAT MARWICK MAIN & CO., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

WILLIAM S. LERACH
LEONARD B. SIMON
(Counsel of Record)
BLAKE M. HARPER
HELEN J. HODGES
ERIC A. ISAACSON
MILBERG WEISS BERSHAD
SPECTHRIE & LERACH
225 Broadway, Suite 2000
San Diego, CA 92101
(619) 231-1058

MICHAEL P. FUCHS
PATRICIA I. AVERY
WOLF POPPER ROSS WOLF & JONES
845 Third Avenue
New York, NY 10022
(212) 759-4600
Counsel for Petitioners

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

16

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES

CASES

Table of Authorities

Statutes

Secondary Authority

No. 90-98

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PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.
INTRODUCTION

The two respondents' briefs opposing certiorari take different tacks in seeking to avoid this Court's review, but neither is satisfactory. Respondent Prudential-Bache Securities, having sought additional time to respond "[b]ecause of the significance of this appeal,"[1] acknowledges the conflict between the Second and Ninth Circuits on the first question presented, Prudential-Bache Brief at 11 n.2, and essentially argues for affirmance. *Id.* at 9-18. Respondent Peat Marwick, on the other hand, goes to great lengths to argue that whatever the outward appearance, there is not *really* a conflict between the circuits on the first question. Neither respondent can dispel the fact that the first question is highly significant, has generated conflicting decisions in the lower federal courts, was decided by the Ninth Circuit in a manner which it acknowledged was inconsistent with prevailing authority in the Second Circuit, and cries out for prompt and definitive resolution.

As to the second question (the right to contribution under Section 10(b) and Section 12), respondents are aligned, with both asserting that the issue was not properly preserved below. They are wrong, as the law did not require — indeed did not permit — petitioner to present this issue to a panel of the Ninth Circuit, as that Circuit had already resolved the issue in another case. Petitioner presented the issue as soon as was appropriate: by suggestion for rehearing *en banc*. Moreover, the second question can be decided as a threshold issue necessarily raised by the third question presented, which plainly was preserved at all levels.

Finally, although both respondents have chosen to spend substantial portions of their energy arguing the merits, they fall back incessantly upon the false assertion that this case presents the question of who will bear the risk of "an

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[1]Letter of July 27, 1990 from Robert D. Feighner to the Honorable Joseph F. Spaniol, Jr.

inadequate" or "unfairly low" settlement. Prudential-Bache Brief at 9, 11, 12; *see also* Peat Marwick Brief at 15. On the contrary, this case presents the highly significant and recurring question of the legal effect of an *adequate* settlement with a defendant of *inadequate* means.[2]

II.

THE LOWER COURTS ARE IN DISARRAY, THE CIRCUITS ARE SPLIT AND NUMEROUS LARGE CASES HANG IN THE BALANCE ON THE QUESTIONS PRESENTED

Respondent Peat Marwick argues that because its skilled attorneys can devise arguable rationales to "reconcile" the widely varying precedents among the circuits, there is no unqualified conflict among the circuits for this Court to resolve. Peat Marwick ignores the fact that the courts themselves perceive a conflict among the circuits on the appropriate contribution bar rule. As to the question of whether contribution may be implied under Section 10(b), Peat Marwick focuses on strained distinctions hoping to distract this Court's attention from the fact that the crucial

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[2]Because this case will affect not only private securities litigation, but also efforts by the bank regulatory agencies to recover losses from the savings and loan scandal, the Court may wish to solicit the views of the Solicitor General on this petition. Indeed, the Federal Deposit Insurance Corporation ("FDIC") sought leave to file an amicus curiae brief supporting en banc rehearing of this case. At least two district courts in the Ninth Circuit have stated that they will apply the "proportional culpability" offset rule from this case to partial settlements entered into between the FDIC and former directors and officers of failed savings institutions. *FDIC v. Strategic Investment Services*, No. 88-1769 (S.D. Cal. July 9, 1990) (oral bench ruling); *FSLIC v. Fitzpatrick*, No. 86-6780 (C.D. Cal. July 25, 1990) (order confirming July 17, 1990 bench ruling). The decison below adopts its proportional offset contribution bar from *In re Sunrise Securities Litigation*, 698 F. Supp. 1256 (E.D. Pa. 1988), where the rule was applied against the Federal Savings and Loan Insurance Corporation ("FSLIC") in the partial settlement of claims arising out of operations of the Sunrise Savings and Loan Association.

underlying conflict is not just between the Ninth Circuit and other lower courts, but between the Ninth Circuit and this Court's precedents.

A. The Contribution Bar Rule Announced Below Conflicts With Precedents In Other Circuits

Respondents purport to reconcile the Ninth Circuit's opinion in this case with the precedents of the other circuits on hypertechnical grounds — that they "were either not decided under the federal securities laws or did not involve an attempt to extinguish the contribution rights of nonsettling defendants." Peat Marwick Brief at 11-12. Respondents do not explain *why* decisions holding that a pro tanto offset is sufficient to *satisfy* a right to contribution do not conflict with the Ninth Circuit's holding that the same pro tanto offset is insufficient to "extinguish" the right. This truly is a distinction without a difference.

Respondent Peat Marwick contends that the Ninth Circuit's approach does not depart from the rules of law articulated in *Singer v. Olympia Brewing Co.,* 878 F.2d 596 (2d Cir. 1989), *cert. denied,* ___ U.S. ___, 110 S.Ct. 729 (1990). It ignores the fact that the Ninth Circuit's opinion in this case *expressly refused* to follow *Singer.*[3] Respondent

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[3]*See* App. A at 17a-22a. Peat Marwick also contends that the Court of Appeals did not reject the "one satisfaction rule" articulated in *Singer,* but its rejection could not be clearer: "We are not convinced that the efficient and equitable administration of this statutorily mandated right must yield to the logic of a general rule." App. A at 22a. The proportional offset rule it adopts allows plaintiffs to obtain a judgment from the nonsettling defendants that affords them *more than their actual damages,* if the amount they have obtained in partial settlement exceeds the proportional liability of the settling defendants. *See* App. A at 21a-22a; *accord Alvarado Partners, L.P. v. Mehta,* 723 F. Supp. 540, 553 (D. Colo. 1989) ("If settling defendants pay an amount greater than their proportionate fault as later determined at trial, plaintiff benefits because it retains the entire prior settlement" *in addition to* the proportional liability obtained at trial from the nonsettling defendants.); *In re Sunrise Securities Litigation,* 698 F. Supp. 1256, 1258 (E.D. Pa. 1988)

Prudential-Bache more candidly acknowledges the "appellate court's rejection of the Second Circuit's position in *Singer,*" but attacks *Singer* as "fail[ing] to consider the various competing concerns addressed" by the Ninth Circuit here. Prudential-Bache Brief at 11 n.2. Attacking the reasoning of *Singer* does not eliminate the conflict.

Indeed, commentators confirm that "[w]ith the *Kaypro* decision, the approaches taken by the courts are in clear conflict." Goodman, Belgum & McDonald, "Contribution and Partial Settlement in Federal Securities Laws Cases," 4 *Insights* 15, 15 (May 1990). District courts too have recognized that the circuits are in conflict. *See Dalton v. Alston & Bird,* [Current Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,348, at 96,683-85 (S.D. Ill. 1990) (rejecting *Franklin* in favor of *Singer*).[4]

(rejecting pro tanto rule which "prevents 'double recovery by a plaintiff' "); *see also* Peat Marwick Brief at 19 & n.13. Of course this violates the explicit congressional mandate of Section 27 of the Securities Act of 1934, that "no person permitted to maintain a suit for damages under the provisions of this title shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages." 15 U.S.C. § 78bb. It is, however, the law of the Ninth Circuit unless corrected by this Court.

[4]Even if the circuits were not in direct conflict, it would be appropriate to grant certiorari because of the importance of the questions presented and the conflicting views in the lower courts. In *Dawson Chemical Co. v. Rohm & Haas Co.,* 448 U.S. 176, 185 & n.4 (1980), the Court granted certiorari "to forestall a possible conflict in the lower courts" on an "important" issue, even though there was "no direct conflict" among the several district court and court of appeals decisions on the issue. The Court has granted certiorari on important issues based on district court conflicts as well. *See Heffron v. International Society for Krishna Consciousness, Inc.,* 452 U.S. 640, 646 n.9 (1981) (citing four district court opinions); *Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 257 n.14 (1981) (citing four district court opinions); *Curtis v. Loether,* 415 U.S. 189, 191 n.2 (1974) (citing "evenly divided" district court decisions as a reason for grant of certiorari); *Massachusetts v. United States,* 435 U.S. 444, 453 (1978) (certiorari granted on a conflict between a court of appeals decision and a district court).

Aside from debating whether the decision below is in four-square conflict with *Singer,* respondents do not seriously dispute the significance of the case or the importance of prompt resolution by this Court. Scores of pending securities fraud class actions are affected by the decision, as settlement negotiators must take into account the decision below, and whether it will remain the law, and become the law in other circuits. Other cases, some involving important governmental interests, *see* n.2, *supra,* will also be affected by the opinion below.

B. The Ninth Circuit's Rule That There Is An Implied Right To Contribution Under Section 10(b) Places That Circuit In Conflict With Precedents In The Other Circuits And With The Decisions Of This Court

The Ninth Circuit's holding that a right to contribution may be implied under the federal securities laws — and under Section 10(b) in particular — conflicts with this Court's reasoning in *Northwest Airlines, Inc. v. Transport Workers Union,* 451 U.S. 77 (1981), and *Texas Industries, Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630 (1981). That alone is a compelling ground for a writ of certiorari to issue.[5] The Ninth Circuit's recognition of an implied right to contribution is based on the kind of general policy rationales that this Court expressly rejected as wholly inappropriate to the question of whether a right to contribution may be implied by the judiciary.[6]

Although respondents deny it, there is also a conflict among the circuits on the question of implied contribution under the federal securities laws. Petitioners' opening brief cites numerous decisions in other circuits which hold that

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[5] *See Army & Air Force Exchange Service v. Sheehan,* 456 U.S. 728, 733 (1982) (certiorari granted where the opinion below "appeared to be in conflict with our precedents").

[6] *See Texas Industries,* 451 U.S. at 635-36, 638; *Northwest Airlines,* 451 U.S. at 89-90, 98-99.

because *Northwest Airlines* and *Texas Industries* are controlling, lower courts *may not* create implied rights of contribution under the federal securities statutes. The Ninth Circuit ignored this Court's holdings to create just such a right.[7] Respondents dismiss numerous precedents on the ground that they were rendered by district courts. They distinguish appellate decisions on the ground that they address different sections other than Section 10(b) — such as Section 12. *But Section 12 claims were part of the settlement in this case.* None of the respondents' purported distinctions changes the fact that the Ninth Circuit is in conflict with this Court, and with the lower courts which have obeyed this Court's mandate. Once again, the conflict is real and serious, and warrants review by this Court.

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[7]Respondents' "conceptual" argument that the right of contribution necessarily inheres in the very concept of joint and several liability, *see* Peat Marwick Brief at 14; Prudential-Bache Brief at 22, cannot be reconciled with this Court's opinions in *Northwest Airlines* and *Texas Industries.* Those opinions, like the common law, recognize joint and several liability and prohibit contribution! *See Northwest Airlines,* 451 U.S. at 86; *Texas Industries,* 451 U.S. at 646 ("[n]or does the judicial determination that defendants should be jointly and severally liable suggest that courts may order contribution").

Although a defendant's right to contribution can exist, conceptually, *only if* the plaintiff has a prior right to joint and severaly liability, the right to contribution *is not* a logical extension of joint and several liability. There can be no doubt: the victim of fraud's right to be made whole is more fundamental than, and superior to, any wrongdoer's right to contribution. *See Texas Industries,* 451 U.S. at 646; *Baker, Watts & Co. v. Miles & Stockbridge,* 876 F.2d 1101, 1104- 06 (4th Cir. 1989). The Ninth Circuit erred by elevating contribution above the victim's right to be made whole. "[W]e are speaking of equities between wrongdoers," the court below recognized, but "we decline to back away from our goal of equity" *for the perpetrators of fraud,* whatever the cost to their victims. App. A at 19a.

C. This Issue Of An Implied Right Of Contribution Under Section 10(b) Of The Securities Exchange Act of 1934 Was Properly Preserved Below

In *Smith v. Mulvaney,* 827 F.2d 558, 561 (9th Cir. 1987), the Ninth Circuit held that there was an implied right of contribution among defendants under Section 10(b). With *Smith* on the books, petitioners did not distinguish between Section 11 and plaintiffs' other claims in the district court, where petitioners prevailed, nor did they do so before the Ninth Circuit.[8] In both courts the issue of whether there is an implied right to contribution under Section 10(b) was foreclosed by *Smith,* and it would have been futile to argue for an overruling of that decision.[9]

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[8]Petitioners in their Court of Appeals brief *called attention to the issue,* conceding that for proceedings before the three-judge panel they would have to "assume the existence of implied rights of contribution under these statutès," but indicating that *Smith* had failed to engage in proper analysis "articulated by the Supreme Court." *See* Appellees' Brief at 24 n.15 (quoted in part in Peat Marwick Brief at 25-26). This Court's precedents indicate that for an issue to be raised it is enough merely to bring the issue to the lower court's attention. "[I]f the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adquately presented." *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 67 (1928) (footnote omitted); *see Eddings v. Oklahoma,* 455 U.S. 104, 113-14 n.9 (1982); *Dyke v. Taylor Implement Mfg. Co.,* 391 U.S. 216, 217 n.3 (1968). Respondent Peat Marwick concedes that petitioners did precisely this in their opening brief to the three-judge panel. *See* Peat Marwick Brief at 25-26. After the panel rendered its decision, petitioners requested a rehearing *en banc* so that the Ninth Circuit could overrule *Smith* and bring its law into conformity with this Court's precedents.

[9]Three-judge panels of the Ninth Circuit cannot consider arguments that prior authority in the circuit was wrongly decided absent an *intervening* decision of the Supreme Court. Indeed, to direct such arguments to a three-judge panel is to "ignore the well-established principle that [the panel] cannot overrule Ninth Circuit precedents without convening en banc." *Kennedy v. Los Angeles Police Dept.,* 901 F.2d 702, 707 n.3 (9th Cir. 1989). "Such a request will only be considered by an en banc court." *United States v. Spilotro,* 800 F.2d 959,

Once petitioners were free of this restriction, they did argue, in their suggestion for rehearing en banc, that *Smith* was wrongly decided, and was inconsistent with the most recent decisions of this Court. Petition for Rehearing with Suggestion for Rehearing En Banc at 14; *see* Peat Marwick Brief at 25-26.

Given this set of facts, respondents' waiver argument is misplaced. Moreover, any deficiency in the particularity with which an issue is raised is cured by the fact that the court below expressly considers or decides the issue[10] — as the Ninth Circuit did in this case. "For we need not inquire how and when the question . . . was raised when such question appears to have been actually considered and decided by that court." *Charleston Federal Savings & Loan Ass'n v. Alderson,* 324 U.S. 182, 185-86 (1945). The panel's opinion unambiguously states: "it has been determined that a right to contribution exists under claims based on section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities Exchange Commission's rules." *Franklin,* App. A at 9a. Analysis need proceed no further than the opinion itself to establish that the issue was thus raised and decided in a fashion that renders it fully appropriate to invoke this Court's jurisdiction to correct the Ninth Circuit's holding. *Charleston Federal,* 324 U.S. at 185-86.

Finally, it must be noted that the viability of contribution under Section 10(b), and Section 12 is fairly raised as encompassed in the question of what contribution bar rule should apply to the settlement of Section 10(b) and Section

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967 (9th Cir. 1986) (Kennedy, J.); *see, e.g., Christoffel v. E.F. Hutton & Co.* 588 F.2d 665, 667 (9th Cir. 1978).

[10]*See Payton v. New York,* 445 U.S. 573, 582 n.19 (1980); *Burch v. Louisiana,* 441 U.S. 130, 133 n.5 (1979); *Orr v. Orr,* 440 U.S. 268, 274-75 (1979); *Franks v. Delaware,* 438 U.S. 154, 161-62 (1978); *Casteneda v. Partida,* 430 U.S. 482, 485 n.4 (1977); *Jenkins v. Georgia,* 418 U.S. 153, 157 (1974); *Ward v. Monroeville,* 409 U.S. 57, 61 (1972); *Ocala Star-Banner Co. v. Damron,* 401 U.S. 295, 299 n.3 (1971); *Dyke,* 391 U.S. at 217 n.3; *Raley v. Ohio,* 360 U.S. 423, 436-37 (1959).

12 claims in this action. Without contribution rights, there is plainly no need (or legal basis) for a contribution bar judgment reduction. Thus, since the first and third questions are properly presented and preserved, the second question may be decided as a necessary step in the Court's analysis.[11]

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[11]Respondents contend that petitioners negotiated to be bound by the same terms imposed by the Ninth Circuit. That is not true.

The settling defendants anticipated the possibility that the nonsettling defendants might appeal, and might even persuade the Ninth Circuit to impose different rules of offset than those agreed to by the settling parties and previously approved by several district courts within the Ninth Circuit. Accordingly, the settling defendants demanded complete protection, in the form of a "back up" clause providing that if the nonsettling defendants prosecuted a successful appeal of the district court's order, the settlement would effect a reduction in judgment to the extent necessary to protect the settling defendants from liability to the nonsettling defendants. This by no means moots this petition for certiorari, which seeks to correct the decision of the Ninth Circuit and to reestablish the pro tanto offset so that plaintiffs may be made whole. Moreover, this case-specific arrangement designed to protect settling defendants in this ground- breaking case does not undermine petitioners' assertion that the rule below will deter many settlements.

III.

CONCLUSION

The petition for writ of certiorari should be granted on all three questions.

DATED: September 18, 1990

Respectfully submitted,

MILBERG WEISS BERSHAD
SPECTHRIE & LERACH
WILLIAM S. LERACH
LEONARD B. SIMON
(Counsel of Record)
BLAKE M. HARPER
HELEN J. HODGES
ERIC A. ISAACSON

LEONARD B. SIMON
Counsel of Record for Petitioners

225 Broadway, Suite 2000
San Diego, CA 92101
Telephone: 619/231-1058

WOLF POPPER ROSS WOLF
& JONES
MICHAEL P. FUCHS
PATRICIA I. AVERY
845 Third AVenue
New York, NY 10022
Telephone: 212/759-4600

No. 90-98

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

GEORGE FRANKLIN, et al.,
Petitioners,

v.

PEAT MARWICK MAIN & CO., et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

DAVID B. GOLD
(Counsel of Record)
PAUL F. BENNETT
STEVEN O. SIDENER
DAVID B. GOLD,
A Professional Law Corporation
595 Market Street, Suite 2300
San Francisco, CA 94105
(415) 777-2230

JONATHAN W. CUNEO
(NASCAT General Counsel)
Law Offices of
JONATHAN W. CUNEO
1300 Eye Street, N.W.
East Tower, Suite 480
Washington, DC 20005
(202) 962-3860
Counsel for Amicus Curiae

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

26

Pursuant to Rule 37.2 of the Rules of this Court, the National Association of Securities and Commercial Law Attorneys ("NASCAT") respectfully moves for leave to file the enclosed brief as *amicus curiae* in support of Petitioners. Counsel for the Petitioners has granted consent to file this brief. Counsel for the Respondents have refused to consent to the filing of this brief.

NASCAT is an association of law firms consisting of approximately 500 attorneys located throughout the United States whose purpose is to promote the enactment and enforcement of legislation which protects investors from deceptive and manipulative practices and to ensure that the securities markets operate in a fair and free manner. NASCAT members have represented plaintiffs in a variety of individual and class action contexts under the federal securities laws. NASCAT members have also represented defendants in securities and other complex cases.

NASCAT and its members have a strong interest in the effective private enforcement of the federal securities laws and in the development of case law that effectively deters wrongdoers from perpetrating securities violations upon public investors. The issues raised by the Petition are extremely important to the investment community and the capital markets generally. The Ninth Circuit's decision in *Franklin v. Kaypro Corp.*, 884 F.2d 1222 (9th Cir. 1989) (the "Opinion"), as it relates to the availability of contribution and the impact of partial settlements on contribution rights, unduly restricts the effectiveness of the federal securities law and contravenes Congress' intent in passing those laws. The Opinion ensures that the trial courts of the United States will be clogged with unnecessary litigation with no increased benefit to litigants or the judiciary. It erects unwarranted impediments to legitimate and good faith settlements—all for the stated purpose of doing "equity" to persons who have been found, after trial and appeal, to be wrongdoers. *Franklin v. Kaypro Corp.*, *supra*, 884 F.2d at 1231.

The enclosed *amicus curiae* brief addressses the two specific legal issues raised by the Petition: (1) the appropriate settlement bar rule to be applied in those circumstances where Congress, by statute, has created a right of contribution; and (2) whether, under Section 10(b) of the Securities Exchange Act of 1934, and

Rule 10b-5 promulgated thereunder, or under Section 12(2) of the Securities Act of 1933, there exists an implied right of contribution.

Respectfully submitted,

DAVID B. GOLD
(Counsel of Record)
PAUL F. BENNETT
STEVEN O. SIDENER
DAVID B. GOLD,
A Professional Law Corporation
595 Market Street, Suite 2300
San Francisco, CA 94105
(415) 777-2230

JONATHAN W. CUNEO
(NASCAT General Counsel)
Law Offices of
JONATHAN W. CUNEO
1300 Eye Street, N.W.
East Tower, Suite 480
Washington, DC 20005
(202) 962-3860
Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES

Cases

Page

Rules, Statutes and Regulations

TABLE OF AUTHORITIES

Rules, Statutes and Regulations

Other Authorities

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE

As explained in the foregoing motion for leave to participate as amicus curiae, NASCAT is a national association of law firms consisting of approximately 500 attorneys located throughout the United States. NASCAT's primary purpose is to facilitate the protection of investors and other consumers through appropriate legislative and judicial activity.

The issues raised by the Petition are extremely important to the management of complex, multi-party litigation in the federal courts. The Ninth Circuit's decision in *Franklin v. Kaypro Corp.*, 884 F.2d 1222 (9th Cir. 1989) (the "Opinion"), as it relates to the availability of contribution under the federal securities laws, and the impact of partial settlements on contribution rights, unduly restricts the effectiveness of the federal securities laws and contravenes Congress' intent in enacting those laws. In essence, the Opinion ensures that the trial courts of the United States will be clogged with unnecessary litigation with no additional benefit to litigants or the judiciary. It erects unwarranted impediments to legitimate and good faith settlements—all for the stated purpose of doing "equity" to persons who have been found, after trial and appeal, to be wrongdoers. In addition, the Opinion overlooks or rejects contrary decisions from other Circuit Courts and fails to correctly analyze the desirability and wisdom of allowing parties and trial courts to effectuate partial settlements in complex, multi-party actions. Specifically, the Second and Third Circuits have reached results contrary to the Opinion. As such, there exists a serious conflict among the Circuits on important legal issues which affect the administration of justice and the interpretation of the federal securities laws. Based on the discussion presented here and in the Petition, we believe that the Petition should be granted so that this Court can resolve these important and controverted legal issues.

SUMMARY OF ARGUMENT

Where express rights of contribution exist under the federal securities laws, this Court should recognize that the appropriate settlement bar rule is based on the *pro tanto* rule. This rule should

have the following components: (i) it should be applicable only to partial settlements entered into in "good faith;" (ii) plaintiffs' claims against non-settling tortfeasors should be reduced by the settlement payment made by the settling tortfeasors; and (iii) tortfeasors who settle with plaintiffs should be protected from all claims for contribution and indemnity by nonsettling tortfeasors arising out of the alleged wrongful conduct. The adoption of such a rule would foster important public policy goals of encouraging settlements, protecting investors and carrying out Congress' objectives in enacting the federal securities laws while at the same time protecting the legitimate interests of non-settling defendants.

Further, this Court should review whether an implied right of contribution exists under Section 10(b) of the Securities Exchange Act of 1934 or Section 12(2) of the 1933 Securities Act in light of the Court's holding in *Texas Industries, Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630 (1981) and *Northwest Airlines, Inc. v. Transport Workers Union of America AFC-CIO*, 451 U.S. 77 (1981).

ARGUMENT

I

THE SETTLEMENT BAR RULE ANNOUNCED BY THE NINTH CIRCUIT IN *KAYPRO* IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS AND IS CONTRARY TO CONGRESS' INTENT IN ENACTING THE FEDERAL SECURITIES LAWS

The settlement bar rule announced by the Ninth Circuit in *Kaypro* admittedly will discourage the prompt resolution of multiparty litigation through good faith settlements. It does so by completely ignoring the Third Circuit's decision in *Miller v. Apartments and Homes of New Jersey, Inc.*, 646 F.2d 101, 109 (3d Cir. 1981). The Opinion even admits that it is at odds with, and therefore rejects, the recent Second Circuit decision in *Singer*

v. Olympia Brewing Co., 878 F.2d 596 (2d Cir. 1989).[1] Moreover, the Opinion ignores the historical evolution of good faith settlements and bar orders as promulgated by the American Law Institute. In so doing, the Opinion creates conflicts among the Circuit Courts. Indeed, since its promulgation, district courts in the First and Seventh Circuits have rejected, as unsound, the settlement bar rule promulgated by the Ninth Circuit in *Kaypro*. *See Dalton v. Alston & Bird*, [Current Binder], Fed.Sec.L.Rep. (CCH) ¶ 95,348 (S.D.Ill.1990); *In re Atlantic Financial Management, Inc. Securities Litigation*, 718 F.Supp. 1012 (D.Mass.1989).[2]

Settlement bar rules implemented under state statutes or by judicial decisions can be classified broadly into two categories: *pro tanto* and *pro rata* (or proportional). Under the *pro tanto* rule, a plaintiff's claims against non-settlors are reduced by the amount of the payment received from a settling defendant; the settling defendant is protected from claims for contribution and indemnity that might be asserted by non-settlors. The rule protects the settling defendants from further exposure in connection with the action and assures the plaintiff that his claims against the non-settlors will be reduced only by the amount of the settlement. The *pro tanto* rule also protects non-settlors in that any partial settlement which purports to bar claims for indemnity and contribution must be made in "good faith." The *pro tanto* rule is generally recognized as a rule that promotes settlement. It assures plaintiffs that they will be made whole if they prevail against any

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[1] The ruling of the Second Circuit in *Singer* is in line with the holdings in numerous other circuits. *See, e.g., Gould v. American-Hawaiian Steamship Co.*, 535 F.2d 761, 784 (3d Cir. 1976); *Screen Gems—Columbia Music, Inc. v. Mettis & Lebow Corp.*, 453 F.2d 552, 554 (2d Cir. 1972); *Makethan v. Burrus Cootes & Burrus*, 545 F.2d 1388, 1390 (4th Cir. 1976), *cert. denied*, 434 U.S. 826 (1977); *Gill v. United States*, 429 F.2d 1072, 1079 (5th Cir. 1970).

[2] Since the *Kaypro* Opinion was rendered, the Ninth Circuit in *Miller v. Christopher*, 887 F.2d 902 (9th Cir. 1989) refused to adopt the *Kaypro* settlement bar rule in an admiralty case and instead approved the use of a *pro tanto* settlement bar rule to extinguish claims for contribution. *Id.* at 907-908.

one of the joint tortfeasors. *Miller v. Apartments and Homes of N.J., Inc., supra,* 646 F.2d at 109; *Seymour v. Summa Vista Cinema, Inc.,* 809 F.2d 1385, 1389-90 (9th Cir. 1987), *as amended,* 817 F.2d 609 (9th Cir. 1987).

Under a *pro rata* (or proportional) settlement bar rule, which the Opinion erroneously adopts, the settling defendants are also protected from claims which might be asserted by the non-settlors. The plaintiff's claims against the non-settlors, however, are reduced—not by the amount of the partial settlement—but by the settlors' proportionate share of liability as determined at trial where they are not present as parties and *after* consummation of the partial settlement. This approach limits the risk of trial to the non-settling defendants, encourages the non-settling defendants to refuse to settle on a fair basis, discourages settlements and increases the likelihood of unnecessary trials. For example, non-settlors do not run the risk that the settling parties paid too little. The risk of "underpayment" instead is borne solely by the plaintiff. As such, a plaintiff is very reluctant to settle with less than all defendants unless there is a substantial premium built into the partial settlement to "pay" for the unknown risk which plaintiff would be assuming. This result will necessarily prolong litigation without any real or significant benefit to the parties but with a very real detriment to the judicial system.[3]

The settlement inhibiting effects of the *pro rata* (or proportional) rule were recognized by the National Conference of Commissioners on Uniform State Laws ("NCCUSL"), which amended the *Uniform Contribution* Among Tortfeasors Act ("Uniform Act") in 1955 to move *from* the *pro rata* rule to the *pro tanto* rule precisely because the *pro rata* rule discouraged settlements. *Miller v. Christopher, supra,* 887 F.2d at 906-907. The NCCUSL's comment, based on real world experience, on this change demonstrates the serious flaws in the Opinion:

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[3] This issue is especially important in light of the burgeoning savings and loan crisis, which is now engulfing the federal courts with complex, multi-party litigation. *See, e.g., In re American Continental Corporation/Lincoln Savings and Loan Securities Litigation,* 130 F.R.D. 475 (J.P.M.L.1990).

> The 1939 Act provided, in Section 5, that a release of any tortfeasor should *not* release him from liability for contribution unless it expressly provided for a reduction "to the extent of the pro rata share of the released tortfeasor" of the injured person's recoverable damages. *This provision has been one of the chief causes for complaint where the Act has been adopted, and one of the main objections to adoption.*
>
> * * *
>
> The effect of Section 5 of the Act has been to discourage settlements in joint tort cases, by making it impossible for one joint tortfeasor alone to take a release and close the file. *Plaintiff's attorneys are said to refuse to accept any release which contains the provision reducing damages "to the extent of the pro rata share of the released tortfeasor," because they have no way of knowing what they are giving up.* The "pro rata share" cannot be determined in advance of judgment against the other tortfeasors . . . .
>
> *No defendant wants to settle when he remains open to contribution in an uncertain amount, to be determined on the basis of a judgment against another in a suit to which he will not be a party. Some reports go so far as to say that the 1939 Act has made independent settlement impossible.*

Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Annual Conference Meeting in Its Sixty-Fourth Year, 223-24 (1955) [Emphasis added.] *Miller v. Christopher, supra,* 887 F.2d at 907. In an effort to encourage non-collusive settlements, the NCCUSL amended the Uniform Act to provide for a *pro tanto,* rather than a *pro rata,* settlement bar rule provided settlements were entered into in "good faith." *Id.* at 906-907; *FSLIC v. Butler,* 904 F.2d 505, 511 (9th Cir. 1990).

The Third Circuit considered these same competing policies in *Miller v. Apartment and Homes of New Jersey, Inc.,* 646 F.2d 101 (3d Cir. 1981). *In Miller,* the Third Circuit found that a right to contribution existed in an action brought under 42 U.S.C. § 1982

and the Fair Housing Act. *Id.* at 108. In so doing, the Court noted that:

> Contribution rules are of high importance in the process of settling claims before trial. Consequently, the selection of a contribution rule bears on the work of the federal courts as well as on the substantive rights and liabilities of the parties.

Id.

In developing the appropriate "contribution" rule, the Third Circuit in *Miller* identified three specific policy considerations. First, the court in *Miller* recognized that:

> [The] law generally seeks to assure the tort victim neither more nor less than one complete satisfaction of his claim. A rule of *pro tanto* reduction accomplishes this goal. A rule of *pro rata* reduction frustrates it to the extent that the plaintiff makes a good or a bad settlement.

Id. at 109. Contrary to the foregoing, the Opinion suggests that a plaintiff should be willing to forego a complete satisfaction of his claim even if the claim is fully and successfully litigated. The Opinion further suggests that a partial settlement means that a plaintiff has somehow voluntarily agreed to something less than a full satisfaction of his claim. This is wrong. Moreover, it is contrary to the settled law of, at least, the Second and Third Circuits. *See, e.g., Singer v. Olympia Brewing Co., supra,* 878 F.2d at 660.

The *Miller* court also identified other appropriate policy factors:

> Second, the law seeks to encourage settlements. A rule that the settling defendant will remain liable to contribute after an award against a non-settling defendant would impede settlements. So would a rule that the plaintiff must give non-settling defendants the benefit of a *pro rata* reduction in their liability. The 1939 Uniform Contribution Among Tortfeasors Act emphasized competing policies rather than the policy of promoting settlements. Section 4 of the 1939 Act required a *pro tanto* credit for the amount of settlements the plaintiff received. However, Section 5 declared that settling defendants remained liable to contribute to non-settling defendants unless the release provided for a *pro rata* reduc-

tion of the plaintiff's damages recoverable against all the other tort-feasors. *The 1955 Uniform Contribution Among Tort-feasors Act abandoned that policy choice.* The 1955 Act retains the direct *pro tanto* credit rule. But section 4(b) now provides:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of the two or more persons liable in tort for the same injury or the same wrongful death; . . . (b) It discharges the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor.

See, 73 A.L.R.2d 403 (1960).

Miller v. Apartment and Homes of New Jersey, Inc., supra, 646 F.2d at 109.

By 1955, leading experts in the field recognized that such an approach made multi-party settlements on a partial basis virtually impossible. *Miller v. Apartment and Homes of New Jersey, Inc., supra*, 646 F.2d at 109. As a direct result, the 1955 version of the Act adopted the *pro tanto* rule of contribution. *FSLIC v. Butler, supra*, 904 F.2d at 511. Unless the Petition is granted and the Opinion reversed, virtually no partial settlements of complex multi-party litigation will be entered into in the Ninth Circuit, thus needlessly causing an increase in complex litigation. Such a result is contrary to the public policy of encouraging the settlement of litigation, especially complex litigation. *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976).

The third policy factor identified by the Third Circuit in *Miller* consisted of the relative equities among wrongdoers. In this regard, the Third Circuit in *Miller* stated:

> A rule of *pro rata* reduction achieves the goal of equality albeit at the expense of other values. The same could be said of the rule of the 1939 Act which held a settling defendant liable to contribute.

Miller v. Apartments and Homes of New Jersey, Inc., supra, 646 F.2d at 109.

The Opinion places primary, if not sole, weight on this factor. Such reliance, however, is totally misguided. As the Opinion candidly admits, "we are speaking of equities between wrongdoers." *Kaypro, supra,* 884 F.2d at 1231. Nevertheless, the Opinion concludes that *it is equitable to protect proven wrongdoers from those it has victimized.* This is not equity. Indeed, it makes a mockery of the very essence of equity. A non-settling defendant (or their insurers) should not receive an economic windfall solely because certain co-defendants (or their insurers) have chosen to act responsibly and to settle a lawsuit in good faith.

The Third Circuit in *Miller* recognized as much when it established the controlling settlement bar rule. As the Third Circuit held:

> In making our choice, we accord the least weight to the third principle [*i.e.*, equities among joint tortfeasors]. We believe that parties generally will have sufficient incentive to negotiate settlements as vigorously as they can, and that in most cases the settlements achieved will not deviate unacceptably from the aimed for proportionality of payment. We further believe that in most cases favoritism will present no problem, and that skilled attorneys will be able to discover collusive settlements and avoid the feared harmful effects of the collusion.[4] We see no necessary conflict between the first two policies. The policy of allowing complete satisfaction is furthered by a rule of *pro tanto* credit. And the rule of *pro tanto* credit is plainly preferable to a rule of *pro rata* credit in civil rights cases, *where one or more defendants have settled*

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[4] The Opinion contends that trial courts are incapable, in a good faith hearing, of determining whether a proposed settlement is fraudulent or collusive. This is incorrect. Trial courts, on a daily basis, make serious decisions affecting the lives and property of persons which decisions are subject to review. Furthermore, the suggestion that a good faith hearing requires "a full evidentiary hearing on all of the parties' relative culpabilities" is simply wrong. *See Miller v. Christopher, supra,* 887 F.2d at 907-908.

> *with a plaintiff, the damages recoverable by that plaintiff shall be reduced by the amount of the settlement received.*

Id. at 109-110.[5]

The Ninth Circuit recently cited the *Miller* case with approval in a securities case. *Seymour v. Summa Vista Cinema, Inc., supra,* 809 F.2d at 1389. In Seymour, the Ninth Circuit approved the use of the *pro tanto* rule by stating that:

> We start with the fundamental principle that a payment made by a joint tortfeasor diminishes the claim against the remaining tortfeasors . . . .
>
> * * *
>
> While the district court's approach is without precise precedent, it comports with the policies of the law in this area. *The foremost of these is assuring the tort victim one complete satisfaction of his claim, neither more nor less. Miller v. Apartments and Homes of New Jersey, Inc.,* 646 F.2d 101, 109 (3d Cir. 1981). By deducting the fair market value of the settlement agreement, the district court provided plaintiffs one satisfaction of their claim. Although future events may diverge from the district court's prediction, the determination must be made as of the time of the judgment. Our system of justice cannot provide certainty; a *fair and reasonable approximation in light of the facts available when the court makes its decision suffices.* The district court's approach also serves another policy, that of encouraging settlement even with those whose present financial condition may be less than optimal. *Adopting Alexander's proposed ap-*

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[5] This Court modified the scope of *Miller* when it held that where there is a comprehensive Congressional statutory scheme, such as Title VII or the Equal Pay Act, *no* rights of contribution will be judicially implied. *Northwest Airlines, Inc. v. Transport Workers Union,* 451 U.S. 77 (1981). Where a right to contribution does exist, however, the *Miller* analysis is very relevant because it considers each of the policy issues and weighs each appropriately. As such, *Miller* is directly on point. The Opinion, however, fails to mention *Miller* or weigh the important policy factors identified by the Third Circuit in that case.

> *proach might well deter plaintiffs from settling with impecunious defendants for fear that a paper judgment will bar recovery against solvent defendants.*

Id. at 1389-90. [Emphasis added.] The holding by the Ninth Circuit in *Seymour* is inconsistent with the Opinion since *Kaypro* expressly envisions situations where a tort victim will not receive complete satisfaction even if victorious.

The Ninth Circuit specifically recognized that its Opinion was contrary to the holding of the Second Circuit in *Singer v. Olympia Brewing Co.*, 878 F.2d 596, 599-600 (2d Cir. 1989). *Kaypro, supra*, 884 F.2d at 1230. Not surprisingly, since the Opinion was rendered, district courts in—at least—the First and Seventh Circuits have also rejected the *Kaypro* Opinion. For example, in *Dalton v. Alston & Bird*, [Current Binder], Fed.Sec.L.Rep. (CCH) ¶ 95,348 (S.D.Ill.1990), an Illinois district court carefully weighed the public policy considerations raised in *Kaypro* and *Singer* and chose the *Singer* rule. In so doing, the *Dalton* court held:

> The Court believes that the *Singer* approach is the better approach to this problem. First, the *Singer* approach is much easier in application. The jury need not determine the relative fault of all defendants, including those defendants who are no longer participating in the trial. Under the *Franklin* approach an exact apportionment of liability needs to occur at some point, *i.e.*, at the trial. Second, the *Singer* approach is equitable. The fairness hearing ascertains whether the settlement is fair in light of the potential liability of the defendant and in light of the chance of recovery. Thus, the fairness hearing prevents other defendants from paying far in excess of their share of liability. Even under the one-satisfaction rule, fairness hearings need not become more complicated than they already are. Under the one-satisfaction [rule], no such apportionment ever needs to be made. Third, the *Singer* approach provides finality to the settlement. Under the *Singer* approach, the settling defendants are no longer a part of the litigation, and thus large portions of the trial may be omitted. Under the *Franklin* approach, the settling defendants' liability needs to be determined, and thus

> their activities remain part of the trial. Fourth, the *Singer* approach encourages settlements, while the Franklin approach discourages settlements. Under *Singer*, the uncertainties of trial are increased, and thus parties are more likely to settle. Under *Franklin*, a party is guaranteed that it will never pay more than its share of the damages, thus decreasing the risks of trial.

Dalton, supra, ¶ 95,348 at 96,684.

Similarly, in *In re Atlantic Financial Management, Inc. Securities Litigation*, 718 F.Supp. 1012, 1018 (D.Mass. 1989), the district court followed *Singer* and explained the drawbacks of the Ninth Circuit's *Kaypro* approach:

> Delaying final determination of the amount of the set-off deprives the plaintiff class of one of the chief inducements to settle: certainty . . . . Furthermore, in complex securities litigation, the burden on the jury's time and perception is already considerable. To add to this burden the task of apportioning fault between absent and present defendants would obviate much of the advantage of partial settlement to the judicial system itself.

Where contribution claims do exist, this Court should reject the *pro rata* (or proportional) concept embraced in the Opinion. Such a settlement bar rule is inconsistent with Congressional purpose of the federal securities laws. Public policy and Congressional intent behind the federal securities laws is so strong that investor protection cannot and should not be subordinated to the relative "equities among wrongdoers." As this Court recently stated with respect to the 1934 Securities Exchange Act:

> The 1934 Act was designed to protect investors against manipulation of stock prices. Underlying the adoption of extensive disclosure requirements was a legislative philosophy: "There cannot be honest markets without honest publicity" . . . . This Court "repeatedly has described the 'fundamental purpose' of the Act as implementing a 'philosophy of full disclosure.' "

Basic, Inc. v. Levinson, ____ U.S. ____, 108 S.Ct. 978, 982 (1988) (citations omitted). *See also* H.R.Rep. No. 85, 73 Cong.

1st Sess. 8 (1933); S.Rep. No. 47, 73 Cong. 1st Sess. 1 (1933) (setting forth similar purposes for the 1933 Securities Act). Instead, this Court should recognize a *pro tanto* settlement bar rule for use in actions brought by investors under the federal securities laws where there are express rights of contribution. The rule should have the following components: (i) it should be applicable only to partial settlements determined to have been entered into in "good faith" after notice to all parties and a "good faith" hearing is held; (ii) plaintiffs' claims against non-settling tortfeasors should be reduced by the settlement payment made by the settling tortfeasors; and (iii) tortfeasors who settle with plaintiffs should be protected from all claims for contribution and indemnity by non-settling tortfeasors arising out of the alleged wrongful conduct. The adoption of such a rule would foster important public policy goals of encouraging settlements, protecting investors, and carrying out Congress' intent in enacting the federal securities laws while at the same time protecting the legitimate interests of non-settlors.

II

NO RIGHT OF CONTRIBUTION EXISTS UNDER SECTION 10(b) OF THE 1934 SECURITIES EXCHANGE ACT OR SECTION 12(2) OF THE 1933 SECURITIES ACT

The Opinion assumes that a right to contribution is generally available under the federal securities laws. This is incorrect. While certain sections of the Securities Act of 1933 (the "1933 Act") and the Securities Exchange Act of 1934 (the "1934 Act") do provide for a right to contribution, the circuit courts and district courts which have considered the issue, in light of this Court's teachings in *Texas Industries, Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630 (1981) and in *Northwest Airlines, Inc.. v. Transport Workers Union of America AFL-CIO*, 451 U.S. 77 (1981), have determined that no right of contribution exists under Section 12(2) of the 1933 Act or Section 10(b) of the 1934 Act and Rule 10b-5 promulgated thereunder. *See, e.g., Baker, Watts & Company v. Miles & Stockbridge*, 876 F.2d 1101, 1104-1106 (4th Cir. 1989); *In re Professional Financial Manage-*

ment, Ltd., 683 F.Supp. 1283 (D.Minn. 1988); *Nelson v. Craig-Hallum, Inc.*, [1989 Transfer Binder], Fed.Sec.L.Rep. (CCH) ¶ 94,500 (D.Minn. June 25, 1989).

For example, the court in *Nelson* addressed the specific issue of whether a right to contribution existed in actions under Rule 10b-5. *Nelson, supra*, at 93,192. In deciding this issue, the *Nelson* court relied on the analysis in *In re Professional Financial Management, Ltd.*, 683 F.Supp. 1283 (D.Minn. 1988), wherein the court held that there was no right of contribution. In this regard, the court in *Nelson* stated:

> In *Professional Financial Management*, Judge Diana Murphy followed the suggested analytical framework in addressing the precise issue presented by Terrano's contention and held that no right to contribution existed. *In re Professional Management*, 683 F.Supp. at 1285-87.
>
> In opposition to Terrano's motion, Craig Hallum cites numerous cases fcrm other circuits which take a contrary position to Judge Murphy. The Court has examined these cases, along with *Texas Industries, Northwest Airlines* and *Professional Financial Management* and finds itself persuaded by Judge Murphy's reasoning and conclusion. Congress did not expressly provide defendant a right to contribution in enacting Section 10b of the Securities Exchange Act. The policy reasons for providing such a right which Craig Hallum urges this Court to consider, and which have been considered as a basis for providing such a right in other cases, . . . were the same policy reasons which the Supreme Court resisted considering in *Texas Industries* on the grounds that Congress is the more appropriate and better equipped decision making body to pierce their complexity. *Texas Industries*, 451 U.S. at 646-47. Accordingly, Terrano's motion for summary judgment is granted.

Id. at 93,192-93.

In *Baker, Watts, supra*, the Fourth Circuit reached the same conclusion with respect to Section 12(2) claims under the 1933 Act when it held:

> It is unclear whether a federal right of action for contribution would promote the general purposes of the federal securities laws. Although some courts have stated that such a remedy may further the deterrent purposes of the 1933 and 1934 Acts, [citation omitted], much the same regulatory purpose can be ascribed to the anti-trust laws under which no implied right of action for contribution is recognized. *See Texas Industries*, 451 U.S. at 630, 101 S.Ct. at 2062. ***An even greater deterrent effect may exist if a single securities wrong-doer such as Baker, Watts, is held liable for the total adverse judgment....***

Baker, Watts, supra, at 876 F.2d at 1105-1106. [Emphasis added.] The above cases and the cases on which they rely, including this Court's own recent precedents, establish conclusively that no implied right of contribution exists under either Section 10(b) of the 1934 Act or Section 12(2) of the 1933 Act.

In these circumstances, this Court should review the Opinion's apparent holding that a right to contribution generally exists under the federal securities laws. The sole case cited in the Opinion for that proposition is *Heizer Corp. v. Ross*, 601 F.2d 330, 334 (7th Cir. 1979). The *Heizer* case predates and is inconsistent with the Supreme Court decisions upon which the above cases rely in rejecting the contention that rights of contribution exist under Rule 10b-5 or Section 12(2).[6] Indeed, *Heizer* is no longer good law in the circuit in which it was rendered. *King v. Gibbs*, 876 F. 2d 1275, 1280 (7th Cir. 1989). *See also Robin v. Doctors Office Centers Corp.*, 730 F.Supp. 122, 124 (N.D.Ill.1989) (holding that the ruling in *Heizer* that contribution is implied under Section 10(b) is no longer controlling). Applying the analysis mandated by the Supreme Court in *Texas Industries* and *Northwest Airlines*, courts in the Seventh Circuit now hold that "[n]o private cause of action for contribution may be implied under Rule 10b-5. *Robin, supra*, 730 F.Supp. at 125. *See also Financial Savings Bank, Inc. v. American Bankers Insurance Co.*, [1989-90

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[6] Unless there is a right to contribution under Rule 10b-5 or Section 12(2), the Opinion's discussion of settlement bar rules would not be applicable to those claims.

Transfer Binder], Fed.Sec.L.Rep. (CCH) ¶ 94,827 (E.D.N.C. November 1, 1989).

III

THE OPINION DISREGARDS CONGRESS' IMPOSITION OF JOINT AND SEVERAL LIABILITY UNDER SECTION 11

Section 11(a) of the 1933 Act identifies, by category, those groups of persons who are liable for a materially misleading registration statement. Among others, Section 11(a) provides liability for every person who signs the registration statement, every person who is a director of the issuer, the issuer, an accountant or other expert who has with his consent been named as having prepared or certified any part of the registration statement and every underwriter. With respect to each of the persons liable under Section 11(a), Section 11(f) provides that "all or *any one* or more of the persons specified in subsection (a) shall be jointly and severally liable".... [Emphasis added.][7] As a result of Congress' expressed intent, any *one* of these persons may be liable to plaintiffs for the entire amount of the damages sustained thereunder.

The Opinion completely disregards this carefully crafted statutory scheme. For example, the Opinion states that "the [*pro tanto*] offset scheme forces non-settling defendants to pay more than the amount for which they are culpable." *Kaypro, supra,* 884 F.2d at 1230. This assertion is unfounded (and, if true, would be legally irrelevant). Under Section 11, each culpable party is liable to plaintiffs for the *entire amount* of the damages irrespective of their proportionate fault. Section 11(f). The Opinion also inaccurately contends that, under its settlement bar rule, non-settling defendants will never pay more than they would if all parties had gone to trial. *Kaypro, supra,* 884 F.2d at 1231. This contention is wrong. It ignores both the very wording of Section 11 and economic reality. If all defendants go to trial and lose, they are all

[7] Section 11(e) contains special treatment for underwriters which is not relevant to the discussion here.

jointly and severally responsible to the prevailing plaintiff for the entire damages. To the extent that any responsible party is insolvent, close to insolvency or more difficult to execute on, plaintiff will collect on his judgment from the more wealthy defendants irrespective of their culpability. These defendants will then be left with their theoretical contribution claim against insolvent or nearly insolvent defendants which they, in all likelihood, will not pursue because the costs of doing so make no economic or business sense. These are the same costs which the Opinion unfairly states that plaintiffs should incur if they choose to partially settle.

The policy adopted by the Opinion is unwise for a host of reasons. There are legitimate incentives on the part of both plaintiffs and defendants to settle (as there should be) only if the hidden and unknown costs associated with the risks incurred under the Opinion do *not* exist. As such, the Opinion is contrary to public policy because it deters settlements. No plaintiff will consider a partial settlement unless it is demonstrably above the proportionate share of that person's potential responsibility. In that situation, however, a defendant is unlikely to agree to settle. In fact, experience with the 1939 version of the Uniform Contribution Among Tortfeasers Act tell us that the adoption of the Opinion will make partial settlements a rarity, if not an impossibility. In such circumstances, plaintiffs will simply not settle except on a global basis. As a result, defendants who are wealthier will be forced to pay more irrespective of their culpability. This is because the amounts to be recovered in potential partial settlements will decrease dramatically and therefore will reduce the amount of any offset. Thus, contrary to the stated purpose of the Opinion, the Opinion will actually force wealthier defendants to pay more than if the *pro tanto* rule were adopted.[8] More impor-

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[8] Today, most acts of wrongdoing under the federal securities laws are covered by insurance. Therefore, the economic risk of an adverse judgment will not deter prospective wrongdoers—the insurance company and not the wrongdoers usually pay. Rather than maximizing deterrence among wrongdoers, the practical effect of the Opinion is to shift the source of payment from one group of insurance carriers to another group of insurance carriers. In this environment, the Court's

tantly, the entire judicial process, including both the parties and the court system, would be benefitted by the adoption of the *pro tanto* rule because that rule encourages the parties to negotiate reasonable settlements based upon *all* of the facts and circumstances (including the financial resources and exposure of defendants) of each particular case.

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entire discussion of deterrence among wrongdoers is legally and factually irrelevant. As the Third Circuit in *Miller* recognized, the deterrence factor should be given little, if any, weight in fashioning modern day contribution rules.

CONCLUSION

For the foregoing reasons, NASCAT requests the Court to grant the Petition so that these serious legal issues will be considered on their merits. This is especially important because the Opinion creates conflicts among the various Circuits and because the issues raised by the Opinion have national ramifications which will dramatically affect the effective private enforcement of the federal securities laws.

Dated: August 30, 1990

Respectfully submitted,

DAVID B. GOLD
(Counsel of Record)
PAUL F. BENNETT
STEVEN O. SIDENER
DAVID B. GOLD,
A Professional Law Corporation
595 Market Street, Suite 2300
San Francisco, CA 94105
(415) 777-2230

JONATHAN W. CUNEO
(NASCAT General Counsel)
Law Offices of
JONATHAN W. CUNEO
1300 Eye Street, N.W.
East Tower, Suite 480
Washington, DC 20005
(202) 962-3860
Counsel for Amicus Curiae

IX.

THE TERMS OF THE SETTLEMENT

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and among the Settling Plaintiffs, the Settling Defendants, and the Insurers, by and through their respective attorneys or counsel of record, as follows:

A. Definitions

As used in this Stipulation, the following terms have the meanings specified below:

(1) "Person" means an individual, corporation, partnership, limited partnership, association, joint stock company, estate, legal representative, trust, unincorporated organization, and any other type of legal entity and their heirs, successors, or assignees.

(2) "Settlement Class" means all persons, except any defendant (including members of the immediate family of each of the individual defendants, any entity in which any defendant has a controlling interest and the legal representatives, heirs, successors or assigns of any excluded party) named in the Class Action, who purchased or otherwise acquired the stock of Kaypro between August 25, 1983, and December 13, 1984, inclusive.

(3) "Settlement Class members" means all members of the Settlement Class except those persons who file valid and timely requests for exclusion pursuant to the notice of class action determination and partial settlement described in Paragraph IX.F.(1) below.

(4) "Settlement Class Period" means the period August 25, 1983, through December 13, 1984, inclusive.

(5) "Settling Plaintiffs" means each and all of the Class Representatives and the Settlement Class Members.

(6) "Settling Defendants" means each and all of the following persons: (a) Andrew F. Kay; (b) David A. Kay; (c) Allan M. Kay; (d) Mary M. Kay; (e) Arthur B. Laffer; (f) W. Bradford Ryland; (g) Ludwig Weindling; (h) Roger S. Wooley; (i) Roger S. Wooley as Executor of the Estate of Ludwig Weindling; and (j) Kaypro Corporation and each and all of its present and former officers and directors.

(7) "Insurers" means each and all of those persons identified on Exhibit "A" hereto, which shall be filed with the Court under seal.

(8) "Settled Claims" means any and all claims, actions or causes of action, rights or liabilities, including Unknown Claims, which exist or may in the future exist by reason of (i) any matter, cause or thing whatsoever, arising out of, relating to, or in any way connected with the purchase or sale or other disposition of acquisition during the Settlement Class period of any Kaypro common stock by a Settlement Class Member; (ii) any and all claims, actions, causes of action, rights or liabilities, including Unknown Claims, which a Settlement Class Member has or may in the future have by reason of any acts, omissions, or failures to act of any of the Defendants during the Settlement Class Period in (but only in) their capacities as officers, directors, employees, agents, and/or advisors of Kaypro; and (iii) any and all claims, actions, causes of action, rights or liabilities, including Unknown Claims, which a Settlement Class Member has or may in the future have arising out of or in any way connected with or related to any of the facts, circumstances, transactions, events, occurrences, acts or omis-

sions or failures to act, of whatever kind or character whatsoever, irrespective of the state of mind of the actor performing, or omitting to perform the same, that are or could have been alleged, referred to, alluded to, or reflected in the Class Action.

(9) "Unknown Claims" as used in the definition of Settled Claims in Paragraph IX.A.(8) hereof, means claims which the Settlement Class Members do not know or suspect to exist in their favor at the time of the release of the Settling Defendants which if known by them might have affected their settlement with Settling Defendants. Solely with respect to any and all Settled Claims asserted against the Settling Defendants, it is the intention of the parties hereto that, upon the Effective Date, as defined below, each of the Settlement Class Members does hereby expressly waive and relinquish, to the fullest extent permitted by law, the provisions, rights, and benefits of section 1542 of the California Civil Code, which provides:

> A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

i.e., any and all provisions, rights and benefits of any similar statute or law of California or of any other jurisdiction. Each of the Settlement Class Members further acknowledges hereby that said Settlement Class Member is aware that said Settlement Class Member may hereafter discover facts in addition to or different from those which said Settlement Class Member now knows or believes to be true with respect to the subject matter of the release, but that it is the Settlement Class Member's intention to, and each Settlement Class Member does hereby, upon the Effective Date, fully, finally and forever

settle and release any and all Settled Claims asserted against the Settling Defendants only, known or unknown, suspected or unsuspected, contingent or non-contingent, whether or not concealed or hidden which now exist, may hereafter exist, or heretofore have existed, and without regard to the subsequent discovery or existence of such different or additional facts. All of the foregoing is the definition of "Unknown Claims."

(10) "Settlement Fund" means Nine Million Two Hundred Fifty Thousand Dollars ($9,250,000) in cash or cash equivalents, plus such interest earned on or imputed to said sum after transfer to the Escrow Agent.

(11) "Effective Date," or the date on which the settlement embodied in this stipulation becomes "effective," means the date on which the Court's judgment (the "Judgment"), substantially in the form of Exhibit D hereto, becomes final, *i.e.,* 35 days after the entry of the Judgment if no appeal by a Settlement Class Member is filed. If an appeal by a Settlement Class Member is filed, the Effective Date shall be the date of the final affirmance on appeal, the expiration of the time for petitions for writs of certiorari to the U.S. Supreme Court and, if certiorari be granted, the date of final affirmance following review pursuant to that grant; or the final dismissal of any appeal or proceedings on certiorari to the U.S. Supreme Court. No appeal or attempted appeal or any other attempt to secure other appellate review of the Judgment by any Non-Settling Defendant shall affect the finality or the Effective Date of the Settlement in any way.

(12) "Non-Settling Defendant" means (a) Peat, Marwick Mitchell & Co. ("Peat"); (b) Prudential-Bache Securities, Inc., individually, and as the representative of all underwriters who, pursuant to an Underwriting Agreement, participated in the registered public offering and

sale of Kaypro common stock on or about August 25, 1983 ("Underwriters Group"); and (c) the Underwriters (and/or their successors-in-interest) listed on Exhibit C hereto. Settlement Counsel represent and warrant that they will not hereafter assert the Settled Claims against any Person other than the Non-Settling Defendants.

(13) "Escrow Agent" means Milberg Weiss Bershad Specthrie & Lerach and Wolf Popper Ross Wolf & Jones or their successors, as the parties may agree upon, which Escrow Agent shall perform its duties as set forth in this Stipulation.

(14) "Settlement Counsel" means the law firms of Milberg Weiss Bershad Specthrie & Lerach and Wolf Popper Ross Wolf & Jones.

B. Transfer of Funds

(1) Within ten (10) business days of the execution of this Stipulation, the payments comprising the Settlement Fund shall be delivered to the Escrow Agent pursuant to the terms of this Stipulation. Such payments may not be disbursed by the Escrow Agent, except as provided in this Stipulation, an Order of the Court or the agreement of the parties.

(2) The Escrow Agent shall invest the Settlement Fund deposited pursuant to Paragraph IX.B.(1) above, at current market rates in certificates of deposit, money market funds or U.S. T-Bills (the "Escrow Securities") and shall reinvest the proceeds of the Escrow Securities as they mature in similar Escrow Securities at the current market rates.

C. Notice, Administration, Claims Solicitation and Assistance Fund

(1) As soon as practicable after the payments required by paragraph IX.B.(1) are deposited in escrow, the Escrow Agent shall establish a fund separate from the Settlement Fund (the "Notice and Administration Fund") and shall pay $100,000 into the Notice and Administration Fund. The Notice and Administration Fund may be used by Settlement Counsel, without recourse, to pay the costs of indentifying and notifying members of the Settlement Class, soliciting the filing of claims by them, assisting them in making their claims and otherwise administering, on behalf of the Settlement Class, the settlement embodied in this Stipulation.

(2) On the Effective Date, any balance then remaining in the Notice and Administration Fund, less expenses incurred but not yet paid, shall be made a part of the Settlement Fund. Thereafter, Settlement Counsel shall have the right to use such portions of the Settlement Fund as are, in the exercise of their reasonable judgment, necessary to carry out the purposes set forth in paragraph IX.C.(1).

D. Deposit and Exchange of Releases

(1) As soon as practicable after the execution of the Stipulation, each Settling Defendant shall deliver to their respective counsel, in the form of Exhibit E hereto, mutual releases of all claims, if any, that the Settling Defendants may have against each other based on the Settled Claims. On the Effective Date, their respective counsel shall deliver forthwith these releases to the respective counsel for the other Settling Defendants as their interests may then appear.

Said releases shall contain language which renders the releases null and void until the occurrence of the Effective Date.

(2) As soon as practicable after the execution of the Stipulation, each Settling Defendant shall deliver to the Escrow Agent separate executed releases of each Non-Settling Defendant for the claims that such Settling Defendant may have against such Non-Settling Defendant that are based on or arise from the Settled Claims of each Settling Plaintiff. Such releases shall be substantially in the form of Exhibit F hereto and shall be delivered to the Escrow Agent with appropriate written irrevocable instructions providing that the Escrow Agent shall deliver those releases to a Non-Settling Defendant only when (a) all of the events set forth in Paragraph IX.H. below shall have occurred; (b) the Settling Plaintiffs shall have settled the Settled Claims with a Non-Settling Defendant, which settlement is embodied in a final judgment within the meaning of Paragraph IX.G. below; and (c) a Non-Settling Defendant shall have deposited with the Escrow Agent the executed releases described in Paragraph IX.D.(3) below with appropriate written instructions to deliver such releases to the Settling Defendants.

(3) Each of the Settling Plaintiffs agrees that he or she shall not hereafter release, dismiss or settle any claims asserted in the Class Action against a Non-Settling Defendant without the execution by such Non-Settling Defendant of a release of all claims which such Non-Settling Defendant may have against the Settling Defendants that are based on or arise from the Settled Claims of said Settling Plaintiff, which releases shall be substantially in the form of Exhibit G hereto.

E. The Good Faith Hearing

(1) Promptly after execution of this Stipulation, the parties hereto shall jointly move the Court for an order and Judgment (the "Good Faith Order"), substantially in the form of Exhibit H hereto, providing, *inter alia*, (a) that the settlement embodied in this Stipulation is entered into and made in good faith, within the meaning of Sections 877 and 877.6 of the California Code of Civil Procedure, and (b) that all claims for contribution, indemnification, or reimbursement, however denominated, against the Settling Defendants arising under the federal securities laws or state law, including those based in tort, contract or statute, or any other body of law, in favor of persons, including the Non-Settling Defendants, who are asserted to be or who may be joint tortfeasors or wrongdoers, however denominated, with the Settling Defendants in the Settled Claims and based upon or arising from the Settled Claims are extinguished, discharged, satisfied and/or otherwise unenforceable. At the Good Faith Hearing, the Court, or, upon reference, to which reference the parties hereby stipulate, the Honorable Harry R. McCue, United States Magistrate, or his successor, shall be requested by the parties hereto to consider evidence and make findings (or, in the case of Magistrate McCue or his successor, make recommendations to the Court) on those issues which are deemed relevant to the entry of the Good Faith Order.

F. The Notice Order

Promptly after execution of this Stipulation, the Class Representatives shall move the Court for an order (the "Notice Order"), substantially in the form of Exhibit B hereto, providing for notice to the Settlement Class of and hearing on the proposed settlement (the "Settlement

Hearing"). Unless otherwise ordered by the Court, the Settlement Hearing shall occur contemporaneously with the hearing on the Good Faith Order. The Notice Order shall specifically include provisions which, among other things:

(1) Approve forms of notice for mailing to members of the Settlement Class that shall notify Settlement Class Members of the hearing (i) in connection with the Good Faith Order, (ii) on approval of the settlement, and (iii) plaintiffs' counsel's application for attorneys' fees and reimbursement of expenses (the "Settlement Notice");

(2) Approve a summary notice of the hearing on proposed settlement for publication to members of the Settlement Class (the "Summary Notice");

(3) Direct Settlement Counsel to mail or cause to be mailed the Settlement Notice to those members of the Settlement Class who can be identified through reasonable effort. Nominees who purchased Kaypro common stock during the Settlement Class Period will also be requested to send the Settlement Notice to all beneficial owners within ten (10) days after receipt of the Settlement Notice or to send a list of said names and their addresses to Settlement Counsel within ten (10) days of receipt of the Notice;

(4) Direct Settlement Counsel to cause the Summary Notice to be published in the national edition of *The Wall Street Journal*;

(5) Find that the mailing and publication pursuant to Paragraphs 3 and 4 constitute the best notice practicable under the circumstances, including individual notice of all such members of the Settlement Class who can be identified through reasonable effort, and is due and suffi-

cient notice of the matters set forth in the Settlement Notice to all such members of the Settlement Class, and that the Settlement Notice and Summary Notice fully satisfy the requirements of due process and of Rule 23 of the Federal Rules of Civil Procedure;

(6) Provide that any members of the Settlement Class who so desire may exercise the right to exclude themselves from the Certified Class but only if they comply with the requirements for so doing as set forth in the Settlement Notice;

(7) Schedule the Settlement Hearing to be held by the Honorable Harry R. McCue, United States Magistrate or his successor, contemporaneously with the hearing on the Good Faith Order to determine whether the proposed settlement should be approved as fair, reasonable and adequate and whether an order approving the settlement should be entered thereon, and to award counsel fees and expenses to plaintiffs' counsel;

(8) Provide that any objections to the proposed settlement shall be heard and any papers submitted in support of said objections shall be received and considered by the Honorable Harry R. McCue, United States Magistrate, or his successor, at the Settlement Hearing (unless, in its discretion, the Court shall direct otherwise) only if, on or before a date to be specified in the Notice Order, persons making objections shall file notice of their intention to appear and copies of any papers in support of their position with the clerk of the Court and serve such notice and papers on counsel to the parties to this stipulation; and

(9) Provide that all Settlement Class Members, whether or not they file a proof of claim within the time provided for, shall be barred from asserting any Settled

Claims against any of the Settling Defendants, and any such Settlement Class Members shall be conclusively deemed to have released any and all such Settled Claims;

(10) Provide that, unless otherwise ordered by the Court, any person that is not a Settlement Class Member shall have no right to any portion or in the distribution of the Settlement Fund; and

(11) Provide that the Settlement hearing may, from time to time, and without further notice to the Settlement Class, be continued or adjourned by Order of the Court.

G. Judgment To Be Entered By The Court Approving The Settlement

Upon approval by the Honorable Harry R. McCue, United States Magistrate, or his successor, of the settlement of the Class Action contemplated by this Stipulation, a judgment shall be entered by the Court, substantially in the form of Exhibit D attached hereto, which shall:

(1) Approve the settlement embodied in this Stipulation as fair, reasonable and adequate to the Settlement Class;

(2) Dismiss the Class Action as against the Settling Defendants, with prejudice and without costs to any party as against any other;

(3) Adjudge, subject to Paragraph IX.I below, that the Settling Plaintiffs shall be deemed conclusively to have released any rights, claims or causes of action against the Settling Defendants and the Insurers only, including, without limitation (but excluding the Non-Settling Defendants), their respective predecessors and successors, parents, subsidiaries and affiliates, and all their present and former partners, principals, officers, directors, rein-

surers, employees, agents, attorneys, assigns, representatives, heirs, executors and administrators arising out of or based upon the Settled Claims and any and all claims against the Insurers under California Insurance Code, Section 790.03(h);

(4) Bar and permanently enjoin all Settling Plaintiffs from prosecuting the Settled Claims against the Settling Defendants and the Insurers, including, without limitation (but excluding the Non-Settling Defendants), their respective predecessors and successors, parents, subsidiaries and affiliates, and all of their present and former partners, principals, officers, directors, reinsurers, employees, agents, attorneys, assigns, representatives, heirs, executors and administrators; and

(5) Reserve jurisdiction, without affecting the finality of the judgment entered, over: (a) implementation of this settlement and any award or distribution of the Settlement Fund, including interest earned thereon; (b) disposition of the Settlement Fund; (c) hearing and determining applications for attorney's fees, costs, interest, expenses (including fees and costs of experts and/or consultants) in the Class Action; and (d) enforcing and administering this Stipulation.

H. Conditions of Settlement

(1) This Stipulation shall be effective only on the condition that all of the following events occur:

(a) The Settling Defendants timely deliver the Settlement Fund, as required by Paragraphs IX.B., and the releases, as required by Paragraph IX.D. above;

(b) The Court enters the Good Faith Order, as required by Paragraph IX.E. above;

(c) The court enters the Notice Order, as required by Paragraph IX.F. above;

(d) The Court enters the judgment, as required by Paragraph IX.G. above; and

(e) The Representative Plaintiffs obtain an Order of the Court which redefines the scope of the class as provided in Paragraph III.B. above;

(f) The number of shares of Kaypro stock purchased by members of the class who seek, and obtain exclusion therefrom is below certain limits as set forth in Exhibit I hereto, and/or the Settling Defendants decline to exercise their option to withdraw from the Settlement under such circumstances, as set forth in Exhibit J hereto; and

(g) There is an Effective Date.

(2) Upon the occurrence of all of the events referenced in Paragraph IX.H.(1) above, each of the Settling Plaintiffs, subject to the provisions of Paragraph IX.I. below, (a) agrees to dismiss the Class Action against the Settling Defendants, (b) acknowledges full and complete satisfaction of, and does hereby fully, finally and forever settle, release and discharge each and all of the Settling Defendants and Insurers (but excluding the Non-Settling Defendants) and all of their past and present agents, employees, officers, directors, partners, members, shareholders, and their estates, the personal representatives of their estates, executors, heirs, successors, and assigns, who are or ever may become liable with respect to the Settled Claims.

(4) Upon the occurrence of all of the events referenced in Paragraph IX.H.(2) above, any and all interest or rights of the Settling Defendants or the Insurers in or to the Settlement Fund shall be absolutely and forever extinguished.

I. Effect of Disapproval, Cancellation Or Termination

(1) If the Court does not enter the judgment provided for in Paragraph IX.G., or if the Court enters the judgment and appellate review is sought and on such review such judgment is materially modified or reversed, then this Stipulation shall not be cancelled and terminated if all parties to this Stipulation who are adversely affected thereby, within thirty (30) days from the date of the mailing of such ruling to such parties, provide written notice to all other parties hereto of their intent to proceed with this Stipulation. Such notice may be provided on behalf of each party to this Stipulation by their counsel and, on behalf of the Settlement Class, by Settlement Counsel. Neither a modification nor reversal on appeal of any amount of fees, costs, expenses and interest awarded by the Court to any of the Class Representatives, the named plaintiffs or their counsel in the Class Action shall be deemed a material modification of or a part of the material terms of the judgment or this Stipulation.

(2) Excepting only an appeal filed by a Settlement Class Member, the partial settlement shall become final after the Judgment is entered by the District Court approving the Settlement and the Good Faith Order is entered extinguishing the claims of the Non-Settling Defendants. Any appeal by the Non-Settling Defendants from either the Good Faith Order approving the partial settlement or the Judgment extinguishing claims of the Non-Settling Defendants shall not affect the finality of the Settlement between the settling parties or the payment of the fees awarded to plaintiffs' counsel. Upon a successful appeal by the Non-Settling Defendants, however, the Settlement as to the Plaintiff Class shall remain binding and shall convert to a reduction in judgment settlement. The purpose and effect of such a judgment

reduction settlement is to protect the Settling Defendants individually and collectively against any liability for any amount in excess of the Settlement Amount with respect to the Settled Claims or claims for contribution, indemnification, or reimbursement, however denominated, against the Settling Defendants arising under the federal securities laws or state law, including those based in tort, contract or statute, or any other body of law, in favor of persons, including the Non-Settling Defendants who are asserted to be or who may be joint tortfeasors or wrongdoers, however denominated, with the Settling Defendants in the Settled Claims and based upon or arising from the Settled Claims, *i.e.*, any judgment entered against any Non-Settling Defendant would be reduced by the amount of the Settlement between Settling Plaintiffs and Settling Defendants or by the amount of the Settling Defendants' share of the damages, whichever is greater.

(3) If the Effective Date does not occur, or if this Stipulation is terminated or cancelled pursuant to its terms, then, within ten (10) business days after written notification of such event is mailed by Settlement Counsel to the Settling Defendants, the Settlement Fund, plus any amount then remaining in the Notice and Administration Fund, less reasonable Escrow Agent fees and expenses, and any costs disbursed or chargeable to the Notice and Administration Fund, shall be refunded to the agent designated by the Settling Defendants.

(4) If the Effective Date does not occur, or if this Stipulation is terminated pursuant to its terms, neither the Settling Plaintiffs nor any of their counsel shall have any obligation to repay any amounts disbursed from the Notice and Administration Fund. In addition, any expenses already incurred and properly chargeable to the Notice and Administration Fund at the time of such

termination or cancellation but which have not been paid shall be paid by the Escrow Agent is accordance with the terms of this Stipulation prior to said funds being refunded to the agent designated by the Settling Defendants.

(5) If the Effective Date does not occur, or if this Stipulation is terminated or cancelled pursuant to its terms, the parties to this Stipulation shall be deemed to have reverted to their respective status as of the date and time immediately prior to the execution of this Stipulation, and they shall proceed in all respects as if this Stipulation and related orders had not been executed.

J. Escrow Agent

(1) Settlement Counsel are authorized to execute such transactions on behalf of the Settlement Class as are consistent with the terms of this Stipulation.

(2) All funds held by the Escrow Agent shall be deemed and considered to be in *custodia legis* of the Court until such time as such funds shall be distributed pursuant to further order of the Court.

K. Administration and Calculation of Claims, Final Awards and Distributions of Settlement Fund

(1) Settlement Counsel, or their authorized agents, acting on behalf of the Settlement Class, and subject to the supervision, direction and approval of the Court, shall administer and calculate the claims submitted by Settlement Class Members and shall oversee distribution of that portion of the Settlement Fund that is finally awarded by the Court to the Settlement Class.

(2) On and after the Effective Date, the Settlement Fund shall be applied, subject to the approval and further order(s) of the Court, as follows:

(a) To pay counsel to the named plaintiffs in the Class Action attorneys' fees and costs, interest and expenses, including the fees of experts and consultants, if and to the extent allowed by the Court. It is agreed that the procedure for and the allowance or disallowance by the Court of any applications by any of the counsel to the named plaintiffs in the Class Action for attorneys' fees, costs, expenses and interest, including the fees of experts and consultants, to be paid out of the Settlement Fund, are not part of this Stipulation, and any order or proceeding relating thereto shall not operate to terminate or cancel this Stipulation or affect its finality; and

(b) To pay all unpaid costs and expenses incurred in connection with providing notice to members of the Settlement Class, locating Settlement Class Members, soliciting Class claims, assisting with the filing of claims, and in administering and distributing the Settlement Fund to the Settlement Class, and processing proofs of claim, escrow fees and costs and the costs of processing requests for exclusion.

(3) The balance of the Settlement Fund (the "Claimants' Fund") shall be allocated among Settlement Class Members who submit valid, timely proofs of claim ("Authorized Claimants"), in the following manner (the amount so allocated to each Authorized Claimant constituting his or her Payable Claim):

(a) Each such Authorized Claimant will receive an amount which bears the same ratio to the Claimants' Fund as his or her recognized loss bears to the total of all such Authorized Claimants' recognized losses. Recog-

nized loss for purchasers of Kaypro common stock is defined as an amount equal to the amount paid (inclusive of commissions) for all Kaypro stock purchased during the Class Period less the sum of (i) the amount realized (after commissions) from the sale of any such shares sold on or before December 13, 1984, and (ii) the number of any such shares held at the close of business on December 13, 1984, multiplied by $2.88, the closing bid price of Kaypro common stock on December 14, 1984.

(b) Payment in the manner set forth above shall be deemed conclusive against all Authorized Claimants. All Authorized Claimants who fail to file valid and timely proofs of claim shall be barred from participating in distributions from the Claimants' Fund (unless otherwise ordered by the Court), but otherwise shall be bound by all of the terms of this Stipulation, including the terms of any judgment entered and the releases given.

(4) The Settling Defendants shall have no obligations or liabilities or any kind whatsoever in connection with the determination, administration, calculation or payment of claims.

L. Miscellaneous Provision

(1) The parties hereto consent, pursuant to 28 U.S.C. § 636 and Rule 73 of the Federal Rules of Civil Procedure, to United States Magistrate Harry R. McCue conducting all proceedings and entering such orders and judgments as are necessary or required to approve and implement the Settlement, to consider and enter orders concerning plaintiffs' counsels' application for award of attorneys' fees and reimbursement of expenses and to make recommendations to the District Court regarding the Good Faith Order.

(2) At the request of Settlement Counsel, the Settling Defendants agree to be available for interview. At the request of Settlement Counsel, the Settling Defendants agree to attend and testify at the trial of the Class Action or any other actions initiated by the Settling Plaintiffs arising out of the Settled Claims. The requesting counsel agree to give reasonable notice of the scheduled date for any such interview or testimony; to reimburse each such Settling Defendant for his round-trip travel expenses from his then location to the place of trial or interview and his expenses of lodging, meals and local ground travel while making such trip, awaiting such testimony or interview and testifying; and to make such reimbursement no later than ten (10) days after the witness has submitted a statement to Settlement Counsel for the expenses incurred.

(3) Representative Plaintiffs, and each of them, and on behalf of all persons engaged by them to assist them in the prosecution of the Class Action, including, but not limited to, their counsel, attorneys, experts, accountants and agents, agree, to the extent permitted by law, that they shall not provide nor advise, counsel, assistance, documentation, analyses or work product to any person who requests exclusion from the Settlement Class in the prosecution of any claims arising out of, based upon, or otherwise related to the factual allegations or pleadings in the Class Actions.

(4) Nothing in this Stipulation shall be construed to, or contended to, waive or otherwise affect the right of the Settling Plaintiffs to proceed and/or recover against the Non-Settling Defendants in the Class Action.

(5) The parties hereto agree to cooperate to the extent necessary to effectuate all terms and conditions of this Stipulation.

(6) All of the exhibits attached hereto are hereby incorporated by this reference as though fully set forth herein.

(7) This Stipulation may be amended or modified only by a written instrument signed by all parties or their successors-in-interest.

(8) With the exception of any agreements or understandings between and among the Insurers and the Settling Defendants, this Stipulation and the exhibits attached hereto constitute the entire agreement among the parties hereto and no representations, warranties or inducements have been made to any party concerning this Stipulation or its exhibits other than the representations, warranties and covenants contained and memorialized in such documents.

(9) Settlement Counsel, on behalf of the Settlement Class, are expressly authorized by the Class Representatives to take all appropriate action required or permitted to be taken by the Settlement Class pursuant to this Stipulation to effectuate its terms and are also expressly authorized to enter into any modifications or amendments to this Stipulation on behalf of the Settlement Class which they deem appropriate.

(10) Counsel for each Settling Defendant and counsel for the Insurers are authorized to sign this Stipulation on behalf of their respective clients.

(11) This Stipulation may be executed in one or more counterparts. All executed counterparts and each of them shall be deemed to be one and the same instrument. Counsel for the parties to this Stipulation shall exchange among themselves original signed counterparts and a complete set of original executed counterparts shall be filed with the Court.

(12) This Stipulation shall be binding upon, and inure to the benefit of, the successors and assigns of the parties hereto.

(13) All terms of this Stipulation and the exhibits hereto shall be governed by and interpreted according to the laws of the State of California.

(14) All parties shall use best efforts to perform all terms of this Stipulation.

(15) All parties hereto submit to the jurisdiction of the Court for purposes of implementing the settlement embodied in this Stipulation.

IN WITNESS WHEREOF, the parties hereto have caused this Stipulation to be executed, by their duly authorized attorneys, as of the day and year first above written.

MILBERG WEISS BERSHAD
SPECTHRIE & LERACH
WILLIAM S. LERACH
KEITH F. PARK
BLAKE M. HARPER

Dated: August 10, 1987 By: /s/
KEITH F. PARK

2000 Central Savings Tower
225 Broadway
San Diego, CA 92101
Telephone: (619) 231-1058

WOLF POPPER ROSS WOLF & JONES
ROBERT A. SKIRNICK
MICHAEL P. FUCHS
PATRICIA I. AVERY

Dated: August 10, 1987

By: /s/
ROBERT SKIRNICK
845 Third Avenue
New York, New York 10022
Telephone: (212) 759-4600
Co-Lead Counsel for Plaintiffs

ABBEY & ELLIS
ARTHUR N. ABBEY
212 East 39th Street
New York, New York 10016

SCHOENGOLD & SPORN, P.C.
SAMUEL P. SPORN
217 Broadway
New York, New York 10007
Attorneys for Plaintiff Stefan Reznic

WOLF, HALDENSTEIN, ADLER FREEMAN & HERZ
DANIEL W. KRASNER
FRED TAYLOR ISQUITH
270 Madison Avenue
New York, New York 10016
Attorneys for Plaintiffs Jon and Ellen Quint

LAW OFFICES OF
JOSEPH H. WEISS
JOSEPH H. WEISS
319 Fifth Avenue
New York, New York 10016
Attorneys for Plaintiffs Paul L. and Evelyn S. Holmes

SACCOMANNO, CLEGG, MARTIN & KIPPLE
ROBERT D. DANIEL
800 Allied Bank Plaza
Houston, Texas 77002
Attorneys for Plaintiff Richard Love

IRELL & MANELLA
KENNETH R. HEITZ

Dated: July 13, 1987

By: /s/
KENNETH R. HEITZ

1800 Avenue of the Stars
Los Angeles, CA 90067
Attorneys for Defendants Kaypro Corporation, Andrew F. Kay, David A. Kay, Allan M. Kay, and Mary M. Kay

LATHAM & WATKINS
PETER H. BENZIAN

Dated: July 6, 1987

By: /s/
PETER H. BENZIAN

701 B Street, Suite 2100
San Diego, CA 92101-8197

Attorneys for Defendants Laffer, Weindling, Woolley and Ryland

APPROVED AS TO FORM:

Dated: July 6, 1987

MUSICK, PEELER & GARRETT
ROBERT J. FELDHAKE

By: /s/
ROBERT J. FELDHAKE

One Wilshire Building
Suite 2100
Los Angeles, CA 90017

O'MELVENY & MYERS
JOHN W. STAMPER

By: /s/
JOHN W. STAMPER

400 South Hope Street,
Suite 1050
Los Angeles, CA 90071

Attorneys for the Insurance Carriers listed on Exhibit A

[Exhibits Omitted]

APPENDIX E

[Not For Publication]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE FRANKLIN, On Behalf of Himself and All Others Similarly Situated,
Plaintiffs,
v.
KAYPRO CORPORATION; ANDREW F. KAY; DAVID KAY; ALLAN M. KAY; MARY M. KAY; PRUDENTIAL-BACHE SECURITIES, INC.
Defendants.
In Re: KAYPRO CORPORATION, Shareholder Litigation, PRUDENTIAL-BACHE SECURITIES, INC.,
Defendant-Cross-claimant-Appellant,
v.
KAYPRO CORPORATION; ANDREW F. KAY; DAVID A. KAY; ALLAN M. KAY,
Plaintiffs-Cross-claimants-Appellees.
In Re: KAYPRO CORPORATION SECURITIES LITIGATION

GEORGE FRANKLIN, On Behalf of Himself and All Others Similarly Situtated, JON QUINT; ELLEN QUINT; STEFAN REZNIK; WILLIAM B. WEINBERGER; RICHARD LOWE; PAUL L. HOLMES; EVELYN S. HOLMES,
Plaintiffs-Appellees,
v.
KAYPRO CORPORATION; ANDREW F. KAY; DAVID A. KAY; ALLAN M. KAY; MARY M. KAY; ARTHUR B. LAFFER; BRADFORD W. RYLAND; LUDWIG WEINDLING; ROGER S. WOOLEY,
Defendants-Appellants,
v.
PEAT MARWICK MAIN & COMPANY
Defendant-Appellant.

C.A. Nos. 88-5931, 88-5934
D.C. No. CV-84-2091-N

Order
Filed April 10, 1990

Before: FARRIS, FERGUSON and BEEZER, Circuit Judges

The panel has voted to deny the petitions for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc. A vote was taken of the active judges and has failed to receive a majority of votes in favor of en banc consideration. Fed. R. App. P. 35(b).

The petitions for rehearing are denied and the suggestion for rehearing en banc is rejected.

APPENDIX F

Civil No. 85-4302

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

WILLIAM F. DALTON, individually and as a representative of a bondholder class,

vs.

ALSTON & BYRD, et al.,
Defendants.

MEMORANDUM AND ORDER

Filed May 24, 1990

FOREMAN, Chief Judge:

The Court has carefully considered the motion for approval of the settlements between the plaintiff class and the settling defendants, namely the Gallop, Johnson defendants, Hospital Management Associates, Inc. and H.M.A., Inc. (collectively referred to as HMA), and Peter Orr. By separate order, the Court has ruled on the fairness of those settlements. This order addresses those portions of the settlement agreements that seek to bar cross-claims by the non-settling defendants and others against the settling defendants. The Court, being fully advised of the relevant facts and the law, finds that a complete pretrial bar of any and all cross-claims would further the policies of the federal courts of encouraging settlements and avoiding a multiplicity of suits.

FINDINGS OF FACT

By separate orders, the Court has expressed its opinion on the fairness and good faith of the settlements between the plaintiff class and the settling defendants. The Court finds that the discovery in this case has been completed

and the time limit for all substantive motions has expired. Having taken judicial notice of the entire record, in particular the pleadings and affidavits filed regarding plaintiffs' motion for class certification and the numerous motions for summary judgment filed by the defendants, the Court finds that the settling defendants have paid an amount reasonably proportionate to their liability in this case.

CONCLUSIONS OF LAW

Assuming that a right of contribution exists for these claims, an order barring any actions for indemnity or contribution must also provide for the reduction of the non-settling defendants' liability. There are three methods of dealing with this problem: 1) not issue a bar order; 2) issue the order and deduct the entire amount of the settlement from any jury verdict and apportion the remainder among the non-settling defendants; or 3) issue the order and declare that the amount paid by the settling defendant represents that defendant's proportionate share of whatever judgment is ultimately entered in the case. *Franklin v. Kaypro Corp.,* 884 F.2d 1222, 1229-1232 (9th Cir. 1989).

The first alternative should be rejected. This would make settlements less likely and has been disapproved by other courts. *Franklin,* 884 F.2d at 1229.

The second alternative, allowing the settlement amount to operate as a set-off against the liability of the other defendants, was adopted by the Second Circuit in *Singer v. Olympia Brewing Co.,* 878 F.2d 596 (2d Cir. 1989). The court first stated that, in securities litigation based on federal law, a uniform rule of settlement credit is appropriate. *Id.* at 599. The rule adopted in that case is referred to as the "one satisfaction rule" or a *pro-tanto* method.

"Under this rule, when a plaintiff receives a settlement from one defendant, a nonsettling defendant is entitled to a credit of the settlement amount against any judgment obtained by the plaintiff against a nonsettling defendant as long as both the settlement and the judgment represent common damages." *Id.* at 600.

The third approach, adopted in *Franklin*, is the approach urged by the non-settling defendants. The *Franklin* court rejected the *Singer* approach for two reasons. First, the one satisfaction rule may result in additional liability for the non-settling defendants. For example, two defendants would each be liable for $100,000 to the plaintiff, who has suffered $200,000 in common damages. If one defendant settles for $80,000, the other defendant would be liable for $120,000 to the plaintiff, or $20,000 more than if the settlement did not occur. See *Franklin*, 884 F.2d at 1230 n.15 (expressing this concept through the formula $(S - x) + (N + x) = T$, where T equals total liability, S equals the settling defendant's share of the liability, N equals the non-settling defendant's share of the liability, and x equals the excess). The *Franklin* court rejected the idea that a hearing on the good faith of the settlement would remove this problem, since, in order for a court to accurately determine whether a settlement would cause the non-settling defendant to pay more than its fair share would involve a mini-trial on the parties' relative culpability. *Franklin*, 884 F.2d at 1230.

The second reason that the *Franklin* court rejected the one-satisfaction rule is that it would interfere with the dynamics of settlement. *Id.* Settlements are attractive because they reduce the costs of litigation. This cost (i.e. the cost of trial or completing discovery) must be discounted from every settlement to determine its fairness. Under the one-satisfaction rule, the non-settling defend-

ants are required to pay the price of this discount. In the above example, assume that the cost of trial is $10,000. Thus, the plaintiffs, who expect to recover $200,000 after a trial, would gladly settle for $190,000 (the amount of recovery less cost of trial). If one defendant settles for $80,000, and the jury returns a verdict for $200,000, the plaintiff would receive $190,000 after the trial ($80,000 from the settlement, $120,000 from the non-settling defendant, less $10,000 to go to trial). The non-settling defendant, in effect, pays the entire cost of the trial rather than the $5,000 it would pay if both defendants went to trial.

The approach adopted by the *Franklin* court eliminates the problem of overpayment by one of the defendants. Under this approach (referred to as a pro-rata approach), "[a]t trial, the jury is asked not only to determine the total dollar damage amount, but also the percentage of culpability of each of the nonsettling defendants as that of the settling defendants. Nonsettling defendants as a whole will then be required to pay the percentage of the total amount for which they are responsible. The nonsettling defendants will be jointly and severally liable for that percentage, and will continue to have rights of contribution against one another." *Franklin,* 884 F.2d at 1231. In the above example, the jury would be asked to find total damages, and return a verdict for $200,000. The jury will then be asked to apportion fault and, in this case, will find each defendant liable for $100,000. The plaintiff will then recover an additional $100,000, for a total of $180,000.

The Court believes that the *Singer* approach is the better approach to this problem. First, the *Singer* approach is much easier in application. The jury need not determine the relative fault of all defendants, including

those defendants who are no longer participating in the trial. Under the *Franklin* approach an exact apportionment of liability needs to occur at some point, i.e. at the trial. Second, the *Singer* approach is equitable. The fairness hearing ascertains whether the settlement is fair in light of the potential liability of the defendant and in light of the chances of recovery. Thus, the fairness hearing prevents other defendants from paying far in excess of their share of liability. Even under the one-satisfaction rule, fairness hearings need not become more complicated than they already are. Under the one-satisfaction, no such apportionment ever needs to be made. Third, the *Singer* approach provides finality to the settlement. The settling defendants are no longer a part of the litigation, and thus large portions of the trial may be omitted. Under the *Franklin* approach, the settling defendants' liability needs to be determined, and thus their activities remain part of the trial. Fourth, the *Singer* approach encourages settlements, while the *Franklin* approach discourages settlements. Under *Singer,* the uncertainties of trial are increased, and thus parties are more likely to settle. Under *Franklin,* a party is guaranteed that it will never pay more than its share of the damages, thus decreasing the risks of trial.

Most importantly, the entire focus of the *Franklin* court is on fairness to the defendants. A court's role in approving a class action settlement is to insure that the settlement is fair to the absent class members. *Grunin v. International House of Pancakes,* 513 F.2d 114, 123 (8th Cir. 1975), cert. denied 423 U.S. 864; MCL 2d § 30.41 at 236. This does not give a court carte blanche to disregard the rights of non-settling defenants. However, in determining the effect of a bar order, the court must weigh the interests of both the non-settling defendants and the plaintiffs. The defendants are not absent; they have a full

and fair opportunity to be represented by individual counsel. The defendants have the opportunity to protect themselves if it appears that the settlement will result in higher liability (either by objecting to the settlement or by entering into a settlement themselves). Furthermore, plaintiffs are prejudiced under the *Franklin* approach. This approach allows the non-settling defendants to adopt a trial strategy of blaming the settling defendants for the plaintiff's injury in the hope that their share of the total liability will thus be smaller. The plaintiff would, of course, be allowed to present evidence to refute this strategy, but that evidence will probably not be as effective since a plaintiff will not be intimately familiar with the settling defendant's activities.

Another reason for adopting the *Singer* approach is that it is in line with state law. See Ill. Rev. Stat. ch. 70 ¶ 302; Restatement (Second) of Torts § 885(3) (1979). Since most federal securities claims will also have pendent state law claims, an approach which is compatible with state law would be much easier to administer.

Therefore, the Court concludes that the pro-tanto or "one satisfaction" method of reducing a non-settling defendant's liability is preferable to the pro-rata method used in *Franklin*.

The Court also concludes that any bar order entered in this case must also bar any claims for contribution or indemnification by the settling defendants against the non-settling defendants.

ORDER

Wherefore, it is ORDERED that:

1) All claims by the non-settling defendants against H.M.A., Inc., Hospital Management Associates, Inc., Gal-

lop, Johnson, and Peter Orr, for contribution and indemnification under the federal securities laws, the state securities laws, RICO and any and all common law claims and all other claims arising out of the offer, purchase, sale or retention of the Jefferson County Health Facilities Authority First Mortgage Bonds are hereby extinguished, discharged and barred;

2) The non-settling defendants are entitled to a reduction in the amount of damages awarded against them in an amount no more than the total of the partial settlement amount paid by Gallop, Johnson, H.M.A., Inc., Hospital Management Associates, Inc., and Peter Orr;

3) The settlement bar shall also bar cross-claims for contribution and indemnification under the federal securities laws, state securities laws, RICO, and any and all common law claims by Gallop, Johnson, H.M.A., Inc., Hospital Management Associates, Inc., and Peter Orr against the non-settling defendants and all other persons, corporations and entities; IT IS SO ORDERED.

DATED: May 24, 1990.

JAMES L. FOREMAN
Chief Judge

(2)

No. 90-98

FILED
AUG 31 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GEORGE FRANKLIN, *et al.*,
Petitioners,

v.

PEAT MARWICK MAIN & CO., *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

---

BRIEF IN OPPOSITION OF RESPONDENT KPMG PEAT MARWICK

Of Counsel:

LEONARD P. NOVELLO
General Counsel
JOHN A. SHUTKIN
Associate General Counsel
KPMG PEAT MARWICK
767 Fifth Avenue
New York, NY 10153

J. ANTHONY SINCLITICO, III
MARK J. MCKEON
GIBSON, DUNN & CRUTCHER
750 "B" Street, Suite 3300
San Diego, CA 92101-4605

*THEODORE B. OLSON
TERENCE P. ROSS
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5303
(202) 955-8500

**Counsel of Record*

Attorneys for Respondent KPMG Peat Marwick

August 31, 1990

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

Petitioners brought private class actions for damages under various federal securities laws. As a part of a settlement between petitioners and some of the defendants, the settling parties sought an order barring the nonsettling defendants' statutory contribution rights against the settling defendants. The United States Court of Appeals for the Ninth Circuit held that the contribution rights of the nonsettling defendants could be satisfied and thus extinguished prior to trial only by an order limiting the liability of the nonsettling defendants to the proportion of the total liability for which they were collectively responsible. In this context, the petition raises the following questions:

1. Whether and under what circumstances a nonsettling defendant's statutory right to contribution from co-defendants in a private action for damages under federal securities laws may be extinguished prior to trial as a part of a settlement between plaintiffs and some defendants; and

2. Whether there is an implied right of contribution available to a defendant sued under Section 10(b) of the Securities Exchange Act of 1934 and/or under Section 12(2) of the Securities Act of 1933.*

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* On January 1, 1990, respondent formally changed its name to KPMG Peat Marwick. KPMG Peat Marwick is a partnership without any parent, subsidiaries or affiliates.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

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BRIEF IN OPPOSITION OF RESPONDENT KPMG PEAT MARWICK

STATEMENT OF THE CASE

A. Introduction

The United States Court of Appeals for the Ninth Circuit was presented in this case with an issue not previously decided by any federal appellate court. The petitioners had brought federal securities class actions against the issuer of certain securities, its officers and directors, and its auditor and underwriter. Petitioners thereafter entered into a settlement with the insider defendants—the issuer and its directors and officers. As a part of the settlement, in order to provide a full release to the insider defendants,

the settling parties sought and received a District Court order extinguishing the statutory contribution rights of the nonsettling defendants against the settling defendants.

The Ninth Circuit determined that the District Court could properly accommodate the request for a full and final release of the settling defendants only through an order that protected the statutory rights of the nonsettling defendants to contribution from their co-defendants. The court found that those contribution rights could be satisfied prior to trial only by an order limiting the ultimate liability of the nonsettling defendants to their proportionate culpability as determined at trial. In this manner, the Ninth Circuit preserved the rights of defendants under the federal securities laws and the policies underlying those laws while also allowing the plaintiffs the opportunity to effectuate a partial settlement with selected defendants.

The Ninth Circuit's resolution of the issue presented to it was in perfect harmony with the concepts of joint and several liability and contribution that form an interdependent structural component of the federal securities laws. Consistent with that structure, it also facilitated the desire of plaintiffs to settle with and release from further liability the defendants with whom they had reached terms. The Ninth Circuit's resolution of the issue presented to it did not conflict with any other circuit court decision because no other federal appeals court has ever considered and resolved the same issue.

The second question presented by the petition was not considered or resolved by the Ninth Circuit because it was not presented to it.

The third question presented by the petition is properly subsumed within the first question and need not be considered separately.

B. Proceedings Below

This class action is comprised of six cases consolidated in the United States District Court for the Southern Dis-

trict of California as *In re Kaypro Shareholders Securities Litigation*. The petitioners (plaintiffs below) allege violations of the Securities Act of 1933, 15 U.S.C. §§ 77a, *et seq.* (the "1933 Act"), and the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a, *et seq.* (the "1934 Act"), as well as state securities laws (California Corporations Code §§ 25500, *et seq.*) and state common law.

Petitioners were purchasers between August 25, 1983, and July 17, 1984, of the common stock of Kaypro Corporation. The defendants include Kaypro Corporation and eight of its directors and officers (the "Kaypro Defendants"); respondent KPMG Peat Marwick ("Peat Marwick"), Kaypro's outside independent auditor; and respondent Prudential-Bache Securities Inc. ("Bache"), Kaypro's investment banker and the lead underwriter for Kaypro's initial public stock offering.[1]

In 1987, petitioners and the Kaypro Defendants entered into a Stipulation of Settlement, Petition ("Pet.") Appendix ("App.") at 35a-66a, pursuant to which the claims against the Kaypro Defendants would be released in exchange for $9.25 million, slightly less than half their $20 million insurance coverage. Pet. at 4. Among other things, the terms of the Stipulation of Settlement required that the settling parties seek an order from the District Court extinguishing any claims for contribution against the settling defendants possessed by Peat Marwick and Bache, the nonsettling defendants. Pet. App. at 49a.

On February 1, 1988, the District Court approved the Final Judgment and Order of Dismissal and related orders in the form submitted by the petitioners, Pet. App. at 25a-34a, ordering, *inter alia*, that "[a]ll claims for contribution, indemnification, or reimbursement, however denominated, against the Settling Defendants arising under the federal

---

[1] Peat Marwick and Bache will be referred to collectively as the "nonsettling defendants."

securities laws or state law . . . in favor of persons, including Non-Settling Defendants . . . based upon the Settled Claims, are extinguished, discharged, satisfied and/or otherwise unenforceable." Pet. App. at 33a.

The District Court received no evidence on the issue of the relative culpability or fault of the Kaypro Defendants or the nonsettling defendants. The only evidence before the court was a declaration of petitioners' counsel supporting the conclusion that the settlement was made and entered into in good faith. This declaration consisted of numerous newspaper articles, Kaypro's securities filings and petitioners' damage calculations. Therefore, although the court found that the settlement had been entered into in good faith and was reasonable in amount from the standpoint of the class members, the court did not purport to determine the relative culpability of the Kaypro Defendants vis-a-vis the nonsettling defendants.

The nonsettling defendants appealed. They contended that because contribution must be based on the actual relative culpability of the parties, *Smith v. Mulvaney*, 827 F.2d 558, 561 (9th Cir. 1987), a nonsettling defendant's right to contribution could not be eliminated prior to a trial or an adjudication determining the defendant's relative culpability.

The Ninth Circuit determined that the issue whether and under what circumstances a nonsettling defendant's rights to contribution could be extinguished prior to trial as a part of a partial settlement in a federal securities case was a "question of first impression." *Franklin v. Kaypro Corp.*, 884 F.2d 1222 (9th Cir. 1989) *reproduced in* Pet. App. at 1a, 8a.[2] The court considered and rejected

[2] The court below distinguished cases under federal securities laws, where there is a "statutorily created right to contribution," from actions under other federal laws that do not create such a right. 884 F.2d at 1228, n.10, Pet. App. at 14a, n.10. The court did not, however,

the nonsettling defendants' argument that their statutory rights to contribution could not be "satisfied prior to a full trial," *id.* at 1229, Pet. App. at 15a, and turned to the more difficult question of the circumstances under which those rights could be satisfied and extinguished as a result of a settlement between the petitioners and some of the defendants.

The Ninth Circuit examined the nonsettling defendants' statutory right of contribution as balanced against the settling defendants' desire for a complete release. The court considered, but rejected, an approach that would extinguish the contribution rights of the nonsettling defendants in exchange for an offset against any subsequent judgment in the amount of the settlement. *Id.* at 1230, Pet. App. at 17a-19a. The court felt that this approach would permit plaintiffs in securities cases to settle for small amounts with the most culpable defendants and leave the least culpable but most solvent defendants facing the greatest exposure. This would frequently result in the nonsettling defendants paying more than their share of culpability in violation of the comparative fault principles underlying the equitable right to contribution.

The Ninth Circuit determined that it could preserve fully the rights of the nonsettling defendants to contribution and yet permit the settling defendants a full and final release from exposure to liability by providing that the nonsettling defendants' liability would be limited to the portion of liability for which the nonsettling defendants were responsible as determined at trial. The nonsettling defendants would continue to be jointly and severally liable for that remaining percentage, and would continue to have

distinguish between the right to contribution under Section 11 of the 1933 Act, which is expressly articulated in Section 11, and the right to contribution that may be implied under Section 12 of the 1933 Act or Section 10(b) of the 1934 Act as a corollary to the private right of action also implied from those provisions. *See infra* notes 19 & 20.

contribution rights against each other. *Id.* at 1231, Pet. App. at 20a.

The Ninth Circuit remanded to the District Court so that the District Court could refashion its order extinguishing the contribution rights of the nonsettling defendants to add the provision that the liability of the nonsettling defendants would be limited to their actual percentage of liability for the amount of total damages as determined at trial. *Id.* at 1232, Pet. App. at 23a.

SUMMARY OF ARGUMENT

The Ninth Circuit's approach to the preservation of contribution rights created by statute in favor of defendants in federal securities cases, while simultaneously permitting a partial settlement with some defendants and a full release of the settling defendants from those contribution claims, was reasonable and not at variance with any decision by any other federal court of appeals. The Ninth Circuit believed it was dealing with a question of first impression and, in fact, no other federal court of appeals has yet had an opportunity to address the issue.

The Second Circuit decision cited by petitioners as conflicting with the decision below did not involve the evaluation of the pretrial extinguishment of rights to contribution under federal securities laws. In fact, the issue of contribution did not arise in that case in any context and was not even mentioned by that court. Moreover, when examined carefully, it is apparent that the "one satisfaction rule" that was at issue in the Second Circuit case is not necessarily incompatible with the Ninth Circuit's analysis in this case. A court could extinguish the contribution rights of nonsettling defendants by reducing any subsequent judgment against them by the greater of the dollar amount of the prior settlement or by the percentage

of liability of the settling defendants. That approach would honor both the Ninth Circuit's proportionate liability analysis of contribution rights *and* the Second Circuit's one satisfaction rule for offsets of prior settlements. In short, not only do the two circuit court decisions address different questions from different perspectives, but they are capable of being harmonized. There simply does not exist the type of conflict among the circuits that would warrant the invocation of this Court's jurisdiction.

The decision below is a reasoned and rational balancing of statutorily created rights to contribution with the interest of some plaintiffs in some cases to settle with less than all defendants. It does not, as petitioners contend, abrogate joint and several liability, but merely recognizes joint and several liability and contribution as equally important concepts, both of which are entitled to protection by the courts.

And the Ninth Circuit decision does not discourage settlements. It might, under some very limited circumstances, cause a plaintiff to evaluate more carefully some *partial* settlements, but only in those cases where a plaintiff might wish to release a highly culpable party in order to secure funds to litigate against a less culpable but more financially accountable defendant. Global settlements will, in fact, be encouraged by the Ninth Circuit's decision, and plaintiffs in securities cases will retain full control over the settlements they choose voluntarily to negotiate.

Petitioners' second question was not properly presented to the courts below, was not ruled upon below, and is not properly before this Court. Moreover, it does not raise an issue or issues that have been addressed in a directly conflicting manner by the federal courts of appeal. Petitioners' third question is not a separate legal issue and should be resolved in the same manner as their first question.

REASONS WHY THE PETITION SHOULD BE DENIED

I

THE FIRST QUESTION PRESENTED IS NOT A SOURCE OF CONFLICT AMONG THE CIRCUITS

The first question presented in the petition is whether and under what circumstances the statutory contribution rights of defendants in federal securities cases may be released, satisfied or extinguished as a part of a court order approving a settlement between the plaintiff and some of the defendants. This was an issue of first impression for the federal courts of appeals.

Contrary to petitioners' claim, the Ninth Circuit's decision does not conflict with *Singer v. Olympia Brewing Co.*, 878 F.2d 596 (2d Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S. Ct. 729 (1990). The insubstantiality of petitioners' argument that there is such a conflict is revealed by petitioners' decision to confine that argument to a single sentence at the beginning of Part II A 1 of their petition. Petitioners assert that *Singer* conflicts with the decision below, but do not discuss a word of the facts of *Singer* and hasten immediately into a discussion of assertedly conflicting district court decisions. That is because the *Singer* case is not at all inconsistent with the Ninth Circuit's decision in this case, as any close scrutiny of it readily reveals, and, in fact, does not have anything whatsoever to do with rights to contribution.

In *Singer*, the plaintiff brought suit against Olympia Brewing Co. (the "Olympia case") for violation of various antifraud provisions of the federal securities laws and for claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). The RICO claim, however, was dismissed prior to trial. Singer also commenced a similar action in the same court against Loeb Rhoades & Co. (the "Loeb Rhoades case") for injuries resulting from the same events. That action was subsequently transferred to

another district court where, in contrast to the Olympia case, the RICO claim survived a motion to dismiss. The Olympia case went to trial and the jury returned a verdict for Singer and judgment was entered in the amount of \$2,958,350.50. Two weeks later, Loeb Rhoades paid \$1,250,000 to settle the claim against it in the other case. The court in the Olympia case thereupon set off the \$1,250,000 settlement paid by Loeb Rhoades against the \$2,958,350.50 jury verdict rendered against Olympia.

On appeal, Singer argued that the setoff was improper because Loeb Rhoades had settled not only identical securities law claims, but also the RICO claim (with its treble damages provisions) that had been dismissed from the Olympia case. Singer argued that where a plaintiff may be entitled to more damages from one defendant than another, a settlement with one defendant should be deducted not from the amount recovered after trial against the nonsettling defendant, but from the highest amount of "provable damages" that could have been recovered from the settling defendant. 878 F.2d at 600. The Second Circuit rejected Singer's argument, concluding that it "border[ed] on the frivolous." *Id.* Singer's position was contrary to the well-established rule that the settlement amount should be "deducted from the claim or judgment in the litigated case, and not from the potential claim or judgment in the settled case." *Id.* at 601. The Second Circuit upheld the offset applied by the District Court, ruling that, in the context of *Singer*, the "one satisfaction rule" required that the injury recovered in a judgment be reduced by the amount already recovered for the same injury in a settlement with another defendant so that a plaintiff would recover "only one satisfaction for each injury." *Id.* at 600.

Thus, *Singer* is wholly inapposite to the question presented to the Ninth Circuit in this case. The appellant in *Singer* conceded the applicability of the "one satisfaction rule," *id.*, did not seek an allocation of damages based on

relative fault, and did not raise the issue of contribution between co-defendants. Apparently, neither Loeb Rhoades nor Olympia raised the issue of their respective rights to contribution. In contrast, the Ninth Circuit was presented with a partial settlement of a single lawsuit and how to balance the nonsettling defendants' statutory rights to contribution against the plaintiffs' and the settling defendants' desire to extinguish those rights as a part of their settlement.

Although the *Singer* decision does apply the "one satisfaction rule" and affirms the direct deduction of Loeb Rhoades' settlement from Singer's judgment against Olympia, this was a correct and unremarkable result given the fact that all parties conceded the applicability of that rule.[3] Olympia apparently remained free to bring an action against Loeb Rhoades to vindicate its right to contribution. The *Singer* court was *only* concerned with whether the settlement should be deducted from the judgment or from the amount of the settling defendant's potential liability.

There is yet another, more fundamental, reason why *Singer* is not in tension with this case. *Singer* focused on the "one satisfaction rule." That rule, which places a ceiling on plaintiff's recovery, is not necessarily incompatible with the Ninth Circuit's decision in this case. The Ninth Circuit held that after trial the liability of the nonsettling defendants will be limited to "the percentage of the total amount for which they are responsible." 884 F.2d at 1231, Pet. App. at 20a. Applying the same analysis and rationale as the Ninth Circuit, another court could determine that the liability of the nonsettling defendants as determined at trial would be reduced by the dollar-for-dollar amount

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[3] In fact, in a previous case where no settlement bar order was at issue, the Ninth Circuit held in accord with *Singer* that a payment made by a joint tortfeasor would reduce the claim against the remaining tortfeasor on a dollar-for-dollar basis. *Seymour v. Summa Vista Cinema, Inc.*, 809 F.2d 1385, 1389, *modified*, 817 F.2d 609 (9th Cir. 1987).

of the settlement or the amount of the settling defendants' share of the damages, *whichever is greater*. This approach would respect the equitable principle of comparative fault for contribution claims as articulated by the Ninth Circuit, but would also be faithful to the one satisfaction rule.[4]

In fact, as discussed in greater detail *infra*, an amalgamation of the comparative fault principle and the one satisfaction rule was precisely the solution actually negotiated between the petitioners and the settling defendants as a fallback in the event that the terms of their settlement had not been approved by the court of appeals. They expressly agreed that if the nonsettling defendants were to appeal successfully in this case, the settlement would remain binding and "convert to a reduction in judgment settlement" whereby any judgment subsequently entered against a nonsettling defendant "would be reduced by the amount of the Settlement . . . or by the amount of the Settling Defendants' share of the damages, *whichever is greater*." Pet. App. at 55a-56a (emphasis added).

Thus, *Singer* and the Ninth Circuit's decision are not in conflict because they dealt with different issues from entirely discreet perspectives. Moreover, a federal appellate court could readily adhere to the rationales underlying each of the decisions. Indeed, the petitioners have recognized this by incorporating the principles of both *Singer* and the Ninth Circuit's decision below in their settlement agreement in this case.

Petitioners also mistake various other circuit court decisions as conflicting with the decision below in this case. Those decisions, however, were either not decided under the federal securities laws or did not involve an attempt to extinguish the contribution rights of nonsettling

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[4] The Ninth Circuit was not prepared to go this far, as its decision makes clear, 884 F.2d at 1231-32, Pet. App. at 21a-22a, but its decision in this case did not require it to do so. It is perfectly possible that if the right circumstances were presented, the Ninth Circuit, or another court, would do so.

defendants.[5] Therefore, those courts were not required to resolve a conflict between the statutory right to contribution established in the federal securities laws and a request that contribution claims be extinguished as a part of a partial settlement.

Implicitly recognizing that close scrutiny of *Singer* would reveal that there was no conflict among the circuits, petitioners instead concentrate their attention on three district court decisions that purportedly apply conflicting approaches and, based on these district court decisions, argue that "the Circuits [are] badly split on this important issue." Pet. at 16. One of these decisions, however, was handed down prior to the Ninth Circuit's decision in *Franklin* and, thus, was rendered without benefit of the Ninth Circuit's analysis of the issue and its well-crafted solution.[6] Petitioners acknowledge that another of the decisions[7] "does not present precisely the same issue as presented here, as the district judge determined that the liability of the co-defendants may not have been joint and several." Pet. at 19, n.13. And the third district court decision mentioned by petitioners[8] manifestly failed to come to grips with the fundamental differences between *Singer* and this case—specifically, the fact that *Singer* did not involve the attempted pre-trial extinction of contribution rights.

At most, it can be said that the first question presented by this petition is an issue of first impression in the federal

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[5] *Miller v. Apartments & Homes of New Jersey, Inc.*, 646 F.2d 101 (3d Cir. 1981) (civil rights action); *Gould v. American-Hawaiian Steamship Co.*, 535 F.2d 761, 784 (3d Cir. 1976) (securities law violations, but no application for the extinguishing of contribution rights); *Screen Gems—Columbia Music, Inc. v. Metlis & LeBow Corp.*, 453 F.2d 552 (2d Cir. 1972) (copyright infringement action).

[6] *In re Atlantic Financial Management Inc. Securities Litigation*, 718 F. Supp. 1012, 1018 (D. Mass. 1988).

[7] *In re—Terra-Drill Partnerships Securities Litigation*, 726 F. Supp. 655 (S.D. Tex. 1989).

[8] *Dalton v. Alston & Bird*, Civ. No. 85-4302 (S.D. Ill. May 24, 1990).

courts of appeals that is just beginning to be addressed in the district courts.[9] It remains unclear whether the Ninth Circuit's approach will be adopted or modified by other circuit courts or whether the sort of rigorous judicial examination of the issue that can only come from additional decisions by the federal courts of appeals will yield some alternative approach. In either event, this question should not be accepted by the Court at this time.

II

THE NINTH CIRCUIT PROPERLY BALANCED STATUTORY RIGHTS TO CONTRIBUTION WITH THE OTHER GOALS OF THE SECURITIES LAWS AND THE POLICY OF ENCOURAGING SETTLEMENTS

Petitioners repeatedly insist that the Ninth Circuit's decision "revokes" joint and several liability, handicaps victims of securities fraud, and will discourage the settlement of complex securities litigation. None of these contentions is accurate.

A. The Ninth Circuit's Decision Does Not Modify Principles Of Joint And Several Liability

Contribution is an equitable principle that is an integral part of the doctrine of joint and several liability. Contribution was originally developed to mitigate the harsh results of joint and several liability. Note, *Apportioning Contribution Shares Under the Federal Securities Laws Act: A Suggested Approach for an Unsettled Area*, 50 Fordham L. Rev. 450, 456 (1981). The intimate relationship between joint and several liability and contribution is best demonstrated by the fact that the two correlative rights

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[9] Indeed, it appears that the first time this issue was ever addressed definitively in a securities case in the district courts was in 1987 in *In re Nucorp Energy Securities Litigation*, 661 F. Supp. 1403 (S.D. Cal. 1987).

appear in the same sentence in Section 11(f) of the 1933 Act:

> All or any one or more of the persons specified in subsection (a) of this section shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution . . . from any person, who, if sued separately, would have been liable to make the same payment . . . .

15 U.S.C. § 77k(f). Thus, Congress inextricably linked the joint and several liability created under Section 11 with the right to contribution among the parties who are made jointly and severally liable by that section.

Rights of joint and several liability and rights of contribution are just as interdependent, at least conceptually, where those rights are implied, as from Section 10(b) of the 1934 Act.[10]

Petitioners ignore the inherent connection between joint and several liability and the right to contribution. They urge that the nonsettling defendants' express right to contibution under Section 11 may be abrogated as a consequence of petitioners' decision to settle with other defendants in order to preserve petitioners' Section 11 right to joint and several liability. The securities laws, however, create no such preference in favor of a plaintiff's right to joint and several liability over a defendant's right to contribution.

The Ninth Circuit recognized that it need not repeal the right to contribution in order to facilitate petitioners' partial settlement. The court upheld the settlement and the release of the settling defendants. Once petitioners choose to pursue this course, however, their ability to recover the entire judgment sought in the action would potentially be affected adversely if they failed to assess properly the

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[10] *See infra* note 20.

settling defendants' potential level of culpability. The doctrine of joint and several liability is thus only affected by the Ninth Circuit's decision to the extent that an equitable condition is imposed on the granting of petitioners' request to extinguish the nonsettling defendants' equitable rights. That equitable limitation is necessary to preserve the nonsettling defendants' right to contribution.[11]

It is important to stress that the Ninth Circuit's restriction on the right to contribution *and* the concomitant limitation on the liability of the nonsettling defendants is triggered only when a plaintiff settles voluntarily on terms it deems fair and reasonable and affirmatively seeks a judicial order stripping the nonsettling defendants of their contribution rights as a part of the settlement. The Ninth Circuit decided that since the contribution rights are based "on the actual relative culpabilities of the tortfeasors," 884 F.2d at 1226, Pet. App. at 9a, the satisfaction of those rights before trial must be based on the same principle. Plaintiffs do indeed then run some risk if they seriously misassess the settling defendants' proportional culpability, but it is a risk they voluntarily assume and one that they can choose to avoid if they deem it to be too great.

If plaintiffs are fearful that a highly culpable defendant may be offering an inadequate amount to settle, they need not enter into the settlement or they can avoid a settlement that purports to contract away the rights of the nonsettling defendants.

B. The Ninth Circuit's Decision Does Not Inhibit or Weaken the Rights of Victims of Securities Fraud

The victims of securities fraud are not disadvantaged under the Ninth Circuit's decision. They retain complete

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[11] In fact, as among nonsettling defendants, the Ninth Circuit decision recognizes that they would continue to be jointly and severally liable for the percentage of the total amount for which they are collectively responsible, and would also continue to have rights of contribution against one another. 884 F.2d at 1231, Pet. App. at 20a.

control over whether they will settle, with whom, and under what terms. If they wish to settle with an impecunious defendant who played a substantial role in the fraud, they can decline to grant the settling defendant a release from contribution claims. A defendant without resources is not likely to have a strong interest in being relieved of liability for such claims in any event. At bottom, a plaintiff can decline to settle if the settlement will have an adverse impact on the potential recovery.

Petitioners' emphasis on the rights, perspective and interests of plaintiffs in securities cases overlooks the fact that the same law that creates Section 11 liability created the defendants' right to contribution. The right of the defendants to contribution is as important under the law as the plaintiffs' right to joint and several liability. The same is true as to Section 12 of the 1933 Act and Section 10 of the 1934 Act. If the Courts imply private causes of action imposing joint and several liability and then also imply a right to contribution under these provisions, both sets of rights must be accorded co-equal status.

Petitioners' exclusive emphasis on the interests of allegedly defrauded shareholders also ignores other fundamental purposes of the federal securities laws which are protected by the Ninth Circuit decision. Thus, the potential for collusive and inadequate settlements with the most culpable parties, inherent in the *pro tanto* rule, reduces the deterrent effect of the civil damage remedy. Moreover, imposition of liability upon institutions, such as accounting firms, in an amount grossly disproportionate to their secondary role in the securities registration and reporting process, will clearly impair the efficient formation of capital for public companies, an additional goal of the federal securities laws. *See generally* Testimony of Richard C. Breeden, Chairman, U.S. Securities and Exchange Commission, U.S. Senate Committee on Banking, Housing and Urban Affairs, July 19, 1990, 1-3. The long-run effect of such disproportionate liability is to increase the cost of an

accountant's services and to increase the cost of offering securities. Inescapably, the cost of raising capital increases and the nation's "economic muscle" weakens. *Id.*

C. The Ninth Circuit's Decision Is Consistent With Modern Comparative Fault Principles And Promotes Global Settlements

Because this dispute revolves around the rights of defendants to contribution after a partial settlement in securities cases, it is useful to consider the development over the last fifty years of modern settlement-bar rules. Over that time, three approaches have been employed by the courts to address different aspects of the subject: the *pro rata* method, the *pro tanto* method (urged here by petitioners), and the "proportional culpability" method applied by the Ninth Circuit in this case.

Under the *pro rata*, or "equal shares," method, a defendant's liability is determined strictly according to the number of defendants in the lawsuit by dividing the total judgment by the number of tortfeasors. This method was adopted in the 1939 version of the Uniform Contribution Among Tortfeasors Act (the "1939 Uniform Act"), the first of three related model acts developed by the National Conference of Commissioners on Uniform State Laws ("NCCUSL").[12] Under the 1939 Uniform Act, discharge of a settling defendant was conditional on the plaintiff agreeing to give the nonsettling defendant a *pro rata* credit.

[12] Petitioners mistakenly suggest that the 1939 Uniform Act utilized a "proportional fault" approach, and it was this approach that was rejected by the drafters of the 1955 version of the Uniform Contribution Among Tortfeasors Act. Pet. at 20, n.14. That is not correct. Section 5 of the 1939 Uniform Act provides: "Release; Effect on Contribution.—A release by the injured person of one joint tortfeasor does not relieve him from liability to make contribution to another joint tortfeasor unless the release . . . provides for a reduction to the extent of the pro rata share of the released tortfeasor, of the injured person's damages recoverable against all the other tortfeasors." 1939 Uniform Act § 5. *See generally* Note, *Settlement in Joint Tort Cases*, 18 Stan. L. Rev. 486 (1966) (hereinafter, "Stanford Note").

Id. at § 5. Among its many drawbacks, the amount a defendant pays under the *pro rata* method is arbitrarily based on the number of defendants and the rule may accordingly be highly inequitable in its application.

The *pro tanto* approach to settlement credits grants the nonsettling defendant a dollar-for-dollar credit of the settlement amount, and the settling defendant is released from further liability for contribution to the nonsettling defendants. This method, favored by petitioners, is the method adopted in the 1955 version of the Uniform Contribution Among Tortfeasors Act. *Unif. Contribution Among Tortfeasors Act* (1955 revision), 12 U.L.A. 63 (1975) (the "1955 Uniform Act").

The problems with the *pro tanto* method are numerous and were thoroughly explored by the Ninth Circuit below. It allows the plaintiff to select which of several wrongdoers should bear the major burden of payment for a violation. This may be particularly inequitable in cases where the nonsettling parties are minor or peripheral participants in the wrongdoing and the settling defendants are the central actors.

As the Ninth Circuit found, under the *pro tanto* method,

> Plaintiffs may be tempted to engage in collusion with certain defendants. By accepting a low partial settlement, plaintiffs would be able to fund further litigation with no diminution of the total amount eventually received. Similarly, plaintiffs could effect low settlements with defendants who had limited resources, and thereby *force* wealthier defendants to pay more than if all parties proceeded to trial.

884 F.2d at 1230, Pet. App. at 17a-18a (footnote omitted).

Petitioners respond that there was no proof of collusion in this case, and that a low settlement with a culpable defendant will not harm the nonsettling defendants any

more than if the settling defendants went to trial and had no resources to pay a larger portion of the judgment. Every case is different, however, and the Ninth Circuit was concerned with the potential of the *pro tanto* method to provide an incentive for collusion and inequity.

Furthermore, an inequity can easily result under the *pro tanto* method where, as here, the inside participants in the alleged fraud settle for half their insurance coverage and leave the peripheral or secondary defendants, the auditor or the investment bankers, to bear the remaining exposure without recourse or contribution from the settling defendants.

Or a settlement could be *too favorable* with the settling defendant, and the nonsettling defendant could end up owing nothing, despite demonstrable culpability. This also could ultimately lessen the deterrent impact of the securities laws.[13]

Unlike the "proportional credit" method, where the risk of an inadequate settlement falls squarely on the parties who determine the terms of the settlement, the *pro tanto* approach places this risk on the nonsettling defendants—the parties whose statutory rights are being extinguished, but who have no power to control the terms of the settlement. Indeed, the rule invites abuse by plaintiffs, because a plaintiff's bargaining position is much enhanced by his ability to choose which defendant to hold responsible for most of his claim.[14]

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[13] *See Dobson v. Camden*, 705 F.2d 759, 766 (5th Cir. 1983), *rev'd on other grounds*, 725 F.2d 1003 (5th Cir. 1984) (*en banc*) (application of the *pro tanto* rule would contravene the deterrence goals of Section 1983 of the civil rights laws); Adamski, *Contribution and Settlement in Multi-party Actions Under Rule 10b-5*, 66 Iowa L. Rev. 533, 564 (1981) (hereinafter, "Adamski").

[14] "In a multi-party case the threat of an unshared judgment against the last remaining defendant—diminished only by meager settlements with his eager fellows—permits a plaintiff to create acute financial

The utilization of a "good faith" hearing does little or nothing to alleviate the drawbacks of the *pro tanto* method. First, pre-trial "good faith" hearings may waste judicial resources. If all of the parties ultimately settle, they would be bound by their settlement payments, and the adequacy of the payments made by each defendant would not be an issue. *First Fed. Sav. & Loan Ass'n of Pittsburgh v. Oppenheim, Appel, Dixon & Co.*, 631 F. Supp. 1029, 1037 (S.D.N.Y. 1986). Second, a subjective standard like "good faith" is difficult to define, creates uncertainty, and is almost immune from appellate review. Third, as the Ninth Circuit concluded, a properly conducted good faith hearing would require a precise determination of the parties' relative culpabilities. 884 F.2d at 1230, Pet. App. at 18a. The problems with conducting this procedure are apparent:

> [I]t would be unfair to expect that a decision like [determining the percentage of fault] could be made in anything resembling a summary procedure. Since the subtle determination of relative fault has such dramatic consequences, a fact finder would want to hear witnesses, judge demeanor and credibility, *etc.* No mechanism suggests itself except the equivalent of a full blown trial on the merits. Indeed, no one has suggested that the determination of the settling defendant's percentage share could be determined elsewhere but at the trial itself.

DeWolf, *Several Liability and the Effect of Settlement on Claim Reduction: Further Thoughts*, 23 Gonz. L. Rev. 37, 62 (1987).[15]

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pressures bordering on extortion." *River Garden Farms, Inc. v. Superior Court*, 26 Cal. App. 3d 986, 994, 26 Cal. Rptr. 458, 503 (1972); *accord* Stanford Note, *supra* note 12, at 490.

[15] Petitioners derive considerable comfort from the "good faith" hearing conducted by the trial court in this case. Pet. at 10. This hearing was conducted in accordance with the California state court practice established by *Tech-Bilt, Inc. v. Woodward-Clyde & Assoc.*, 38 Cal.3d

Under the "proportional credit" approach adopted by the Ninth Circuit in this case, the possibility of collusion between plaintiff and the settling defendant is almost nonexistent, and the nonsettling defendants' interests are completely protected. It is unlikely the plaintiff will settle for an intentionally low amount with one wrongdoer, knowing that any judgment against the remaining defendants will be reduced by the settling defendants' proportionate share of *total* damages. Thus, under the Ninth Circuit's approach, there is no need for the court to decide whether the settlement was made in good faith, only whether it is fair and reasonable to the absent class members.

The Ninth Circuit's approach is reflected in the most recent Uniform Act—the Uniform Comparative Fault Act (1977), 12 U.L.A. 39 (Supp. 1990) (the "1977 Uniform Act"). The NCCUSL concluded that neither the 1939 Uniform Act nor the 1955 Uniform Act was appropriate in a comparative fault system that based ultimate responsibility on the proportional fault of the parties involved. *Id.* at 40 (prefatory comment); *accord Dobson v. Camden*, 705 F.2d at 769.

The 1977 Uniform Act was therefore offered as a replacement whenever comparative fault principles have been adopted, such as in the federal securities laws. 1977 Uniform Act, 12 U.L.A. at 40 (Supp. 1990) (prefatory note); *see Smith v. Mulvaney*, 827 F.2d at 561. This approach

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488, 499 (1985). A California court is required to examine a number of factors, including the settling defendant's insurance coverage, to determine if the settlement is in "good faith." But, the court is *not* required to determine the settling defendant's relative culpability. All that is required is that the settlement be in the "reasonable range of the settling tortfeasor's proportional share of comparative liability for the plaintiff's injuries." *Id.* In the present case, the trial court was able to approve the settlement as being in "good faith," despite the fact that there was *no* evidence before it as to the relative culpability of the parties.

has been advocated by scholars, and has an extensive following in legislation and judicial decisions.[16]

The only benefit that petitioners can ascribe to the *pro tanto* rule is that it encourages *partial* settlements. Pet. at 13. Whether partial settlements are a worthwhile goal is debatable. The judicial system is still burdened with a case whenever a settlement is not complete. Judicial economy is greater when a plaintiff disposes of an entire case by negotiating collectively with all the defendants. Therefore, a policy that promotes *global* settlements fulfills a materially more important judicial goal. Fleming, *supra* note 16, at 1495; Stanford Note, *supra* note 12, at 489. In a case such as the instant one, for example, there is little benefit to be achieved from a settlement with the Kaypro Defendants since their conduct must still be litigated as the foundation for the liability of the other defendants.

The *pro tanto* rule, in fact, *discourages* global settlements. Because the plaintiff can continue to seek complete recovery after a partial settlement, the plaintiff is encouraged to negotiate piecemeal settlements to build a war chest to fund the prosecution of claims against defendants who may have little reason to be in the case except for the depth of their pockets. 884 F.2d at 1230, Pet. App. at 18a.

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[16] *E.g.*, N.Y. Gen. Oblig. Law § 15-108 (McKinney 1989); *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975) (maritime action); *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246, 1250 (5th Cir. 1979) (same); *Donovan v. Robbins*, 752 F.2d 1170, 1180-82 (7th Cir. 1985) (ERISA action); *Dobson v. Camden*, 705 F.2d at 763-71 (civil rights action); *Gomes v. Brodhurst*, 394 F.2d 465 (3d Cir. 1967) (negligence action); *In re Sunrise Securities Litigation*, 698 F. Supp. 1256, 1257-61 (E.D. Pa. 1988) (securities action); Fleming, *Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with American Motors Association v. Superior Court*, 30 Hastings L.J. 1464, 1494-1498 (1979) (hereinafter, "Fleming"); Adamski, *supra* note 13, at 551-54.

Under the Ninth ~~Circuit's decision~~, although plaintiffs remain free to pursue a piecemeal settlement strategy, they are motivated to negotiate global settlements to minimize the risk of a mistaken assessment of the relative culpability of a settling defendant. Moreover, the plaintiffs are forced to focus their evaluation of a case on the real culpability of a defendant, rather than on a defendant's financial resources.[17]

The Ninth Circuit's decision encourages settlement in several other ways. It permits trial courts to satisfy the rights of nonsettling defendants to contribution prior to trial, thus cutting off claims against settling defendants. The express reason for granting this authority is to facilitate equitable partial settlements. 884 F.2d at 1229, Pet. App. at 16a. The rule also encourages total settlements after the execution of partial settlements. A nonsettling defendant can no longer escape financial responsibility based on its relative culpability merely because a settling defendant has paid more than its share. *See id.* at 1231, Pet. App. at 19a; *accord Dobson v. Camden*, 705 F.2d at 769.

Petitioners contend that the Ninth Circuit's rule discourages plaintiffs from reaching partial settlements by making the settlement too "dangerous" for them. Pet. at

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[17] This point is illustrated by petitioners' enthusiastic endorsement of the hypothetical under which they would recover $15.75 million of a $25 million judgment from defendants who are responsible for only 10% of the damages. Pet. at 9. The plaintiffs in such a situation are, of course, quite comfortable with their $25 million recovery. The settling defendants and their insurer are also pleased because they have paid only $9.75 million on a $25 million exposure and have saved over half of the $20 million insurance policy. The unfortunate parties in this scenario are the nonsettling defendants, who have to pay a $15.75 million judgment for which their proportionate share of the liability is only $2.5 million with no hope of recovering the difference from the settling defendants or their insurance carrier because the plaintiffs have successfully bargained with other parties to discharge those rights.

22. But, a settlement under the Ninth Circuit's rule is no more "dangerous" than any other settlement. Any diminution in the total recovery by a plaintiff is entirely the consequence of the plaintiff's decision to settle. Implicit in a plaintiff's decision to settle is the risk that more could be obtained through trial. Of course, the settling plaintiff is also eliminating the possibility of an adverse verdict. The risk that a plaintiff takes of misassessing these factors is present in *every* decision to settle.

The ultimate refutation of petitioners' unrelenting attack on the Ninth Circuit's decision is that the settlement they negotiated with the settling defendants contains a similar principle. The underlying Stipulation of Settlement provides that in the event of a successful appeal of the District Court's approval of the settlement by the nonsettling defendants, the settlement "shall convert to a reduction in judgment settlement" whereby any judgment against the nonsettling defendants "would be reduced by the amount of the Settlement . . . or by the amount of the Settling Defendants' share of the damages, *whichever is greater*." Pet. App. at 55a-56a (emphasis added). Thus, petitioners' agreement with the settling defendants expressly contemplates the possibility of the same outcome reached by the Ninth Circuit because, if the settlement were to be successfully attacked by the nonsettling defendants, the petitioners agreed that the settling defendants would nonetheless be released and the nonsettling defendants would not pay more than their proportionate share of the damages. This agreement is nothing more than a contractually negotiated version of the Ninth Circuit's proportional credit rule. In fact, as noted earlier, petitioners' Stipulation of Settlement contemplates a worse outcome for petitioners because the nonsettling defendants would receive a credit of the *greater* of the actual settlement *or* the settling defendants' share of liability.

In this context, petitioners' claim that "if the Ninth Circuit's rule had been known from the outset, plaintiffs

would not have settled with Kaypro and its eight officers and directors" seems disingenuous. Pet. at 22. As the Ninth Circuit recognized, "[a]n overwhelming majority of class action suits settle before trial." 884 F.2d at 1225, Pet. App. at 6a. For the past fifty-five years, securities actions have been settled by one of two methods. The first is with a contractually negotiated judgment protection clause such as that used by the petitioners and the settling defendants here.[18] The second method is by global settlement. Petitioners' attempt to portray the Ninth Circuit's decision as a radical departure from the *status quo* is not accurate, because the decision merely adopts a commonly used and effective settlement technique.

III

PETITIONERS DID NOT PROPERLY RAISE OR PRESERVE THE SECOND QUESTION PRESENTED

The second question presented by the petition is whether an implied right to contribution exists under Section 10(b) of the 1934 Act or under Section 12(2) of the 1933 Act. Petitioners assert that several federal courts of appeals have reached conclusions inconsistent with the Ninth Circuit's view that a right to contribution can be implied under these provisions of the federal securities laws. Petitioners, however, did not properly raise or preserve this question below.

Petitioners acknowledged to the Ninth Circuit that "[t]he issue of whether an implied right [of contribution] exists was not presented to or decided by the [district] court below." Appellees' Opposition Brief at 24 n.15. Petitioners, in fact, conceded before the Ninth Circuit that "an implied

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[18] For reported cases where a judgment reduction provision was a term of the settlement, *see In re Flight Transportation Corp. Securities Litigation*, 794 F.2d 318, 319 (8th Cir. 1986), *cert. denied*, 481 U.S. 1013 (1987); *Rose v. Associated Anesthesiologists*, 501 F.2d 806, 807 and n.2 (D.C. Cir. 1974) (medical malpractice case).

right to contribution [under the federal securities laws] is generally recognized," and petitioners "assume the existence of implied rights of contribution under these statutes . . . ." *Id.*

The first time petitioners asked any court to resolve the issue they now present to this Court was in their Petition for Rehearing in which they stated that "*if* the court rehears the case *en banc*, it can also determine whether there is an implied right to contribution under Section 10(b) . . . ." Petition for Rehearing with Suggestion for Rehearing *en banc*, p. 14 (emphasis added).

Raising an issue for the first time in a petition for rehearing is untimely. *Hoover v. Ronwin*, 467 U.S. 1268 (1984). Thus, the second question presented by the petition is simply unsuited for review by the Court. *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, ___ U.S. ___, 109 S. Ct. 2909, 2921 n.23 (1989); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 78 n.2 (1988); *Dothard v. Rawlinson*, 433 U.S. 321, 323 n.1 (1977).

Nor was this issue passed upon by the Ninth Circuit in this case. The court noted in passing that a right to contribution has been implied under Section 10(b) of the 1934 Act, without purporting to decide the issue itself. 884 F.2d at 1226, Pet. App. at 9a.[19] The court did not mention Section 12(2) of the 1933 Act at all.

Even if these issues had been timely raised below, there is no significant circuit conflict here. Every federal court of appeals that has considered the issue has concluded that there are implied contribution rights under Section 10(b)

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[19] The Ninth Circuit had concluded in another case that an implied right of contribution exists under Section 10(b) of the 1934 Act. *Smith v. Mulvaney*, 827 F.2d at 560. The question whether an implied right of contribution exists under Section 12(2) of the 1933 Act has not yet been decided by the Ninth Circuit.

of the 1934 Act.[20] Petitioners' citation of district court opinions on this issue does not change this fact.[21] The one circuit court that has declined to imply a contribution right under Section 12(2) of the 1934 Act does not present a serious conflict with the Ninth Circuit in this case where the Ninth Circuit simply did not address the issue in any context.

CONCLUSION

The principal issue presented for consideration by this Court in the petition for a writ of certiorari is not the subject of a conflict among the circuits and is still a developing issue in the district courts. The Ninth Circuit's

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[20] The Second, Fifth, Seventh and Ninth Circuits have implied a right of contribution under Section 10(b). *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 578 (2d Cir.), *cert. denied*, 459 U.S. 838 (1982); *Globus, Inc. v. Law Research Service, Inc.*, 318 F. Supp. 955, 957-58 (S.D.N.Y. 1970), *result and reasoning aff'd without opinion*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 375 (1971); *Huddleston v. Herman & MacLean*, 640 F.2d 534, 556-59 (5th Cir. 1981), *aff'd in part, rev'd in part on other grounds*, 459 U.S. 375 (1983); *Heizer v. Ross*. 601 F.2d 330, 334 (7th Cir. 1979); *Smith v. Mulvaney*, 827 F.2d at 560.

[21] Pet. at 26 n.17. Petitioners also wrongly suggest that *Heizer Corp. v. Ross*, which implied contribution rights under Section 10(b), is no longer the law of the Seventh Circuit. *Id.* at 26. In *King v. Gibbs*, 876 F.2d 1275 (7th Cir. 1989), the Seventh Circuit considered whether it could imply *indemnification* rights under Section 10(b). In deciding this question, the court declined to follow the analytical approach it took in *Heizer* on the question whether to imply contribution rights under the same statute, because *Heizer* was decided before *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981) and *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77 (1981). The Seventh Circuit, however, did *not* overrule *Heizer*. *Robin v. Doctors Officenters Corp.*, 730 F. Supp. 122, 124 (N.D. Ill. 1989). Moreover, other courts have implied contribution rights under Section 10(b) using the type of analysis called for by *Texas Industries* and *Northwest Airlines*, including at least one district court in the Seventh Circuit. *Eastern Holdings, Inc. v. The Illinois Co. Investments, Inc.*, 1989 U.S. Dist. LEXIS 8515 (N.D. Ill. 1989).

analysis and resolution of that issue was sound and should not be disturbed or even accepted for consideration at this time. The other question presented by the petition was, by petitioners' own admission, not timely raised or properly preserved below. Nor does it present a material conflict among the circuits. For these reasons, the petition should be denied.

Respectfully submitted,

*THEODORE B. OLSON
TERENCE P. ROSS
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5303
(202) 955-8500

**Counsel of Record*

Of Counsel:

LEONARD P. NOVELLO
General Counsel
JOHN A. SHUTKIN
Associate General Counsel
KPMG PEAT MARWICK
767 Fifth Avenue
New York, NY 10153

J. ANTHONY SINCLITICO, III
MARK J. MCKEON
GIBSON, DUNN & CRUTCHER
750 "B" Street, Suite 3300
San Diego, CA 92101-4605

Attorneys for Respondent KPMG Peat Marwick

August 31, 1990

(3)

No. 90-98

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

GEORGE FRANKLIN, et al.,
Petitioners,

vs.

PEAT MARWICK MAIN & CO., et al.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KEESAL, YOUNG & LOGAN
STEPHEN YOUNG
ROBERT D. FEIGHNER
(Counsel of Record)
BEN R. SUTER
Catalina Landing
310 Golden Shore
Long Beach, California 90801-1730
Telephone: (213) 436-9051

Counsel for Respondent Prudential-Bache Securities Inc.

Bowne of Los Angeles Inc., Law Printers (213) 627-2200

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Miscellaneous

No. 90-98

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

INTRODUCTORY STATEMENT

This brief in opposition to petition for writ of *certiorari* is filed on behalf of PRUDENTIAL-BACHE SECURITIES INC. ("Prudential-Bache"), a defendant and cross-complainant in the district court and an appellant in the Ninth Circuit proceedings. It is filed in opposition to the petition filed by GEORGE FRANKLIN, JON QUINT, ELLEN QUINT, STEFAN REZNIK, WILLIAM B. WEINBERGER, RICHARD LOWE, PAUL L. HOLMES and EVELYN S. HOLMES, plaintiffs in the

district court and appellees in the Ninth Circuit proceedings.

Petitioners, on behalf of themselves and a certified class consisting of persons other than defendants who purchased Kaypro Corporation stock during the class period, filed an action under the federal securities laws and common law against Kaypro Corporation, its officers and directors, Peat Marwick Main & Co. ("Peat Marwick"), its accountants, and Prudential-Bache, the lead underwriter for a 1983 offering of Kaypro common stock. The appeal below, as well as this petition, concerns the effect of petitioners' settlement with Kaypro and its officers and directors on non-settling defendants' statutory and contractual rights of contribution and indemnification.

Petitioners seek relief from this Court from the rule of proportionate liability for non-settling defendants set forth by the appellate court on the ground that it unfairly prejudices petitioners in their potential recovery in this action. The petition does not accurately reflect either the nature of settlement negotiations or the terms of the settlement agreement. Moreover, it seeks to obscure the fact that the rule fashioned by the appellate court places no greater burden upon petitioners than that which they contracted for in their settlement agreement.

II.

STATEMENT OF THE CASE

The petition asserts that after discovery and certification, settlement negotiations ensued between plaintiffs and Kaypro (together with its officers and directors). The petition then states that "Bache and Peat Marwick were

invited to join the settlement discussions but refused." (Petition, p. 4, first full paragraph.)

The record before the trial court proves otherwise. As Prudential-Bache advised the trial court in its memorandum of points and authorities in opposition to good faith order, the stipulation of settlement which was presented to that court was the fourth draft. Prudential-Bache had been included in the first three drafts as a "settling defendant." Between November 1986 and April 1987, petitioners, settling defendants and Prudential-Bache negotiated and revised three separate predecessor drafts of the stipulation of settlement. (E.R. 563:18-565:3.)

Because Prudential-Bache and plaintiffs could not agree upon final language concerning the effect of the settlement as to *all* settling defendants, petitioners unilaterally chose at the eleventh hour to execute the stipulation of settlement without Prudential-Bache. The record is undisputable (1) that Prudential-Bache was very much involved in settlement negotiations; and (2) that the first three drafts of the settlement agreement provided that Prudential-Bache would be dismissed from this action without paying a cent to petitioners in exchange for its agreement to relinquish its statutory and contractual rights to recover litigation expenses from Kaypro (which were at that time approximately $150,000). (E.R. 564:7-565:22.)

In their statement of the case before this Court, petitioners assert, without citation, that "Kaypro was on its way to bankruptcy [which occurred subsequent to the settlement at issue here], and its officers and directors did not have sufficient personal wealth to contribute significantly to a judgment in a case of this nature, involving claimed damages of over $25 million." (Petition, p. 4, second full paragraph.) Presumably, the risk of

a Kaypro bankruptcy, which appears nowhere in the record below and which was neither mentioned nor a factor in the district court's ruling below, is raised in an attempt to lend credence to petitioners' apparent concern about a shortfall in recovery which, under these facts, could not have occurred.

The reference to Kaypro's financial condition is inappropriate, because it is not based on the trial court record. Moreover, the reference is misleading. The settlement in this case was not funded by any of the individual defendants, including Kaypro, but rather came from two sources, a policy of insurance covering the officers and directors of Kaypro, and Kaypro's property insurer. (E.R. 562:1-571:14.) The policies of insurance were attached to the Suter declaration filed in opposition to the good faith hearing (Clerk's Record 116).

Kaypro's D&O insurer paid $8,925,000 on a $20,000,000 policy, while Kaypro's property insurer paid $325,000 on a $500,000 policy. The $9.25 million paid by Kaypro's insurers represented less than half of the policy limits available. The focus at the time of settlement was not upon a potential Kaypro bankruptcy, as the insurance coverage available could easily have funded a settlement twice the size of that reached between petitioners and settling defendants. Nor do the briefs below contain argument concerning the "wasting asset" (Petitioners' Brief, p. 4, second full paragraph) nature of the policy. The issue at the good faith hearing was not the solvency of the settling defendants, but rather whether their payment of $9.25 million was in the range of good faith for damages alleged to be $25 million arising largely from post-offering conduct by the settling defendants.

Perhaps the most glaring omission from petitioners' statement of the case is their failure to discuss the

contingent nature of the settlement agreement. While it is clear that petitioners and settling defendants sought to obtain a good faith bar (to extinguish all potential cross-claims for contribution and/or indemnity), and to provide non-settling defendants with a "judgment credit" (an offset based upon the amount paid by the settling defendants, without regard to settling defendants' proportionate fault), their settlement agreement in essence provided that

(1) any appeal of the good faith order would not affect the finality of the settlement or the payment of petitioners' attorney's fees; and

(2) upon a successful appeal by the non-settling defendants, the settlement would remain binding and would convert to a reduction in judgment settlement (providing non-settling defendants with a credit based upon the settling defendants' proportionate fault).

Specifically, the stipulation of settlement provided the following:

> Any appeal by the Non-Settling Defendants from either the Good Faith Order approving the partial settlement or the judgment extinguishing claims of the Non-Settling Defendants shall not affect the finality of the Settlement between the settling parties or the payment of the fees awarded to plaintiffs' counsel. *Upon a successful appeal by the Non-Settling Defendants, however, the Settlement as to the Plaintiff Class shall remain binding and shall convert to a reduction in judgment settlement.* The purpose and effect of such a judgment reduction settlement is to protect the Settling Defendants individually and collectively against any liability for any amount in